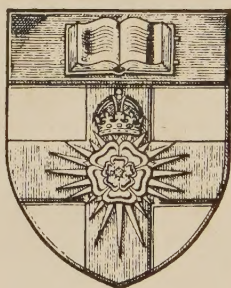


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AND ON APPEAL THEREFROM IN THE

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JUDGES
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OF
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1947

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Applied. *In re THE AFFAIRS OF A. W. BRETT-PITT* - **C. A. 124**
- Degg v. Midland Ry. Co.* (1857) 1 H. & N. 773.
Not followed. *COLMAN v. ISAAC CROFT & SONS* - **Hilbery J. 95**
- Donoghue v. Stevenson* - [1932] A. C. 562
Distinguished. *TRAVERS v. GLOUCESTER CORPORATION* **Lewis J. 71**
- Dovaston v. Payne* (1795) 2 H. Blackstone 527
Discussed. *SUTCLIFFE v. HOLMES* **C. A. 147**
- Foundling Hospital v. Crane* [1911] 2 K. B. 367.
Discussed. *THOMPSON v. McCULLOUGH* - - - **C. A. 447**
- Frederick Braby & Co v. Bedwell* [1926] 1 K. B. 456.
Overruled. *BRAITHWAITE & Co., Ltd. v. ELLIOT* - **C. A. 177**
- Garvin v. Police Authority for City of London* [1944] K. B. 358.
Followed. *POLICE AUTHORITY FOR HUDDERSFIELD v. WATSON* **Divl. Ct. 842**
- Giles v. Randall* - - [1915] 1 K. B. 290
Considered and distinguished. *GOODWIN AND ANOTHER v. STORRAR* **Denning J. 457**
- Glasgow Corporation v. Muir and Others* [1943] A. C.
Observations of Lord Wright at p. 462 followed. *HARTWELL v. GRAYSON ROLLO AND CLOVER DOCKS LTD. AND OTHERS* - **C. A. 901**
- Gold v. Essex County Council* [1942] 2 K. B., pp. 301-2.
Dicta of Lord Greene M.R. Cited. *COLLINS v. HERTFORDSHIRE COUNTY COUNCIL AND ANOTHER* **Hilbery J. 598**
- Graham v. H.M. Commissioners of Public Works and Buildings* [1901] 2 K. B. 781.
Applied. *MINISTER OF WORKS AND PLANNING v. HENDERSON* **Wynn-Parry J. 91**
- Gregory v. Cattle* - - [1943] 1 K. B. 412
Considered. *MOORE v. HEWITT* **Divl. Ct. 831**
- Hart v. Gumpach* (1872) L. R. 4 P. C. 439
Distinguished. *SZALATNAY-STACHO v. FINK* - - - **C. A. 1**

- Heap v. Ind Coope & Allsopp, Ltd.* [1940] 2 K. B. 476.
Distinguished. **HOWARD AND WIFE v. WALKER AND LUKE (TRUSTEES) AND CRISP**
Lord Goddard C.J. 860
- Hocher v. Solomon* (1921) 91 L. J. (Chan.) 8
Not followed. **ARTILLERY MANSIONS, LD. v. MABARTNEY**
Denning J. 594
- Hughes v. Waverlee Local Board* (1894) 10 T. L. R. 357.
Followed. **MOORE v. HEWITT**
Divl. Ct. 831
- Johnstone v. Henry Liston & Co.* [1920] 1 K. B. 99.
Applied. **In re EMBLETON**
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- Johnson v. Needham* [1909] 1 K. B. 626
Considered. **EDWARDS v. JONES**
Divl. Ct. 659
- Johnson v. Pritchard* (1933) 97 J. P. N. 754
Doubted but followed. **MOORE v. HEWITT** - -
Divl. Ct. 831
- Kaye v. Burrows* - - [1931] A. C. 477
Applied. **A. RICHARDSON & SON v. MIDDLESBROUGH BOROUGH ASSESSMENT COMMITTEE AND ANOTHER** -
Divl. Ct. 958
- Kilduff v. Wilson* (1939) 103 J. P. 59
Followed. **HOGG v. SCOTT**
Cassels J. 759
- King v. Rose* - (1675) 1 Freeman 347
Discussed. **SUTCLIFFE v. HOLMES**
C. A. 147
- Kingman v. Seager* - [1938] 1 K. B. 397
Followed and explained. **BRACEGIRDLE v. OXLEY**
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- Knowley v. Rennison* - - Ante p. 488
Distinguished. **LABRUM v. WILKINSON** - - -
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- Lane v. Rendall* - - [1899] 2 Q. B. 673
Followed. **MOORE v. HEWITT**
Divl. Ct. 831
- Lowther v. Clifford* - [1927] 1 K. B. 130
Ratio decidendi held binding and followed on question of jurisdiction. **PRESTON v. NORFOLK COUNTY COUNCIL** - - -
C. A. 775
- Masson Templier & Co. v. De Fries* [1910] 1 K. B. 535.
Distinguished. **WRIGHT v. BENNETT AND ANOTHER**
Denning J. 828
- Merlihan v. A. C. Pope, Ltd.* [1946] K. B. 166
Discussed and doubted. **HORDERN-RICHMOND, LD. v. DUNCAN**
Cassels J. 545
- Mills v. Rose* - - [1923] W. N. 330
Considered. **PRESTON v. NORFOLK COUNTY COUNCIL** -
C. A. 775
- Ministry of Pensions v. Chennell* ante p. 250
Applied. **WEDDERSPOON v. MINISTRY OF PENSIONS** - -
C. A. 562
- Murton v. Aldis* - (1929) 141 L. T. 168
Distinguished. **BRAITHWAITE & Co., LD. v. ELLIOT**
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- Noakes v. Smith* (1942) 107 J. P. 101
Followed. **HOGG v. SCOTT**
Cassels J. 759
- Norman v. Simpson* - [1946] K. B. 158
Applied. **WATSON v. SAUNDERS-ROE, LD.** - -
C. A. 437
Discussed. **WRIGHT v. ARNOLD**
C. A. 280
- Otto v. Bolton and Norris* [1936] 2 K. B. 46
Followed. **TRAVERS v. GLOUCESTER CORPORATION** - -
Lewis J. 71
- Palser v. Grinling* - [1946] K. B. 631
Considered and Applied. **ARTILLERY MANSIONS, LD. v. MABARTNEY**
Denning J. 594
- Pole-Carew v. Western Counties & General Manure Co., Ltd.* [1920] 2 Ch. 97.
Applied. **JORDAN v. MAY**
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- Pollock v. Charles Burt, Ltd.* [1941] 1 K. B. 121
Applied. **COLMAN v. ISAAC CROFT & SONS** - -
Hilbery J. 95
- Queen's Club Garden Estates, Ltd. v. Bignell* [1924] 1 K. B. 117.
Dictum of Lush J. at p. 132, disapproved. **BRAITHWAITE & Co., LD. v. ELLIOT**
C. A. 177
Approved, but dictum of Salter J. at page 133 disapproved. **CRATE v. MILLER** - - -
C. A. 946
- R. v. Vine Street Police Superintendent* [1916] 1 K. B. 268.
Approved. **REX v. BOTTRILL**
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- Regina v. Gillyard* (1848) 12 Q. B. 527
Followed. **REX v. RECORDER OF LEICESTER** -
Divl. Ct. 726
- Reynolds v. Bannerman* [1922] 1 K. B. 719
Applied. **WATSON v. SAUNDERS-ROE, LD.** - - -
C. A. 437

- Rodgers v. Richards* [1892] 1 Q. B. 555
Not followed. *EDWARDS v. JONES*
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- Roe v. Russell* - - [1928] 2 K. B. 117
Considered. *OAK PROPERTY CO.,*
LD. v. CHAPMAN AND ANOTHER
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- Sharp v. Harvey* (1935) L. J. N. C. C. R.
261.
Discussed. *SUTCLIFFE v. HOLMES*
C. A. 147
- Sharpe v. Nicholls* - [1945] K. B. 383
Followed. *PARKER v. ROSENBERG*
C. A. 371
- Sidebotham v. Holland* [1895] 1 Q. B. 378
Applied. *CRATE v. MILLER*
C. A. 946
- Signy v. Abbey National Building Society*
[1944] K. B. 449.
Applied. *ROBERTS v. JONES*
C. A. 221
- Skinner v. Geary* - - [1931] 2 K. B. 546
Applied. *MURGATROYD v. TRESAR-*
DEN - - - C. A. 316
- Smith v. Barry (Wickham, Third Party)*
(1939) 56 T. L. R. 200.
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- Smith v. Baveystock & Co., Ltd.* (1945)
1 All E. R. 531, 535.
Discussed. *CARR v. THE DECCA*
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Distinguished. *CAKEBREAD v. HOP-*
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C. A. 641
- Speed v. Thomas Swift & Co., Ltd.* [1943]
K. B. 557.
Applied. *WHITBY v. BURT,*
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ANOTHER - *Denning J. 918*
- Swan v. Bank of Scotland* (1836) 10 Bli. N. R.
627.
Followed. *COUTTS & Co. v.*
BROWNE-LECKY *Oliver J. 104*
- Wauthier v. Wilson* (1911) 27 T. L. R. 582
Not followed. *COUTTS & Co. v.*
BROWNE-LECKY *Oliver J. 104*
- Weber, Ex parte* [1916] 1 K. B. 280 (n);
[1916] A. C. 421.
Considered. *REX v. BOTTRILL*
C. A. 41.
- Wheeler v. Wirral Estates, Ltd.* [1925] 1 K. B.
294.
Distinguished. *ROBERTS v. JONES*
C. A. 221
- Wilchick v. Marks and Silverstone* [1934]
2 K. B. 56.
Distinguished. *HOWARD AND WIFE*
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AND CRISP *Lord Goddard C.J. 860*
- Wilkes v. Goodwin* (1923) 2 K. B. 86, 105
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LD. v. MABARTNEY *Denning J. 594*
- Woods, L. H. & Co., Ltd. v. City & West End*
Properties, Ltd. (1921) 38 T. L. R. 98.
Followed. *ARTILLERY MANSIONS,*
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- Woods v. Wallace* (1920) 90 L. J. (K. B.) 319
Not followed. *ARTILLERY MAN-*
SIONS, LD. v. MABARTNEY
Denning J. 594
- Young v. Bristol Aeroplane Co.* [1944] K. B.
718.
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1601.

Poor Relief Act (43 Eliz., c. 2), s. 4. *THOM-*
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1774.

Life Assurance Act (14 Geo. 3, c. 48), s. 4.
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1825.

Juries Act (6 Geo. 4, c. 50), s. 1. *PERRINS v.*
PYE - - - Divl. Ct. 749

1829.

Metropolitan Police Act (10 Geo. 4, c. 44), s. 5.
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1881.

London Hackney Carriage Act (1 & 2 Will. 4
c. 22), s. 43. GOODMAN *v.* SERLE
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1885.

Highway Act (5 & 6 Will. 4, c. 50), ss.
84, 85, 88, 89 and 91. THE KING *v.*
ESSEX JUSTICES. *Ex parte* EAST
HAM BOROUGH COUNCIL
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1888.

Small Tenements Recovery Act. RUDLER
v. FRANKS - - Divl. Ct. 580

1844.

Poor Law Amendment Act (7 & 8 Vict., c. 101),
s. 4. BARNSELY *v.* MARSH
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1847.

Town Police Clauses Act (10 & 11 Vict.,
c. 89), s. 37. THE KING *v.* WEY-
MOUTH BOROUGH COUNCIL. *Ex*
parte TELETAX (WEYMOUTH), LD.
Divl. Ct. 583

1848.

Summary Jurisdiction Act (11 & 12 Vict.,
c. 43), s. 5. CARTER PATERSONS AND
PICKFORDS CARRIERS, LD. *v.* WESSEL
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— — — ss. 16, 35. BARNSELY *v.* MARSH
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— — — ss. 1, 10. EDWARDS *v.* JONES
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1853.

London Hackney Carriage Act (16 & 17
Vict., c. 33), ss. 7, 17. GOODMAN *v.*
SERLE - - - Divl. Ct. 808

1869.

Metropolitan Public Carriage Act (32 & 33
Vict., c. 115), ss. 9, 15. GOODMAN
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1872.

Bastardy Laws Amendment Act (35 & 36
Vict., c. 36), s. 4. MOORE *v.* HEWITT
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1880.

Spirits Act (43 & 44 Vict., c. 24), ss. 105, 108
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1882.

Bills of Exchange Act (45 & 46 Vict., c. 61),
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1891.

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103; sch. I. ATTORNEY-GENERAL
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— — — s. 103, sch. I. ATTORNEY-GENERAL
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POWER CO., LD. Macnaghten J. 27

1901.

Factory and Workshop Act (1 Edw. 7, c. 22),
s. 149, sub-s. 1. A. RICHARDSON &
SON *v.* MIDDLESBROUGH BOROUGH
ASSESSMENT COMMITTEE AND
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1910.

Licensing (Consolidation) Act (10 Edw. 7 &
1 Geo. 5, c. 24), s. 10, sub-s. 3.
FUSSELL *v.* LICENSING COMMITTEE
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— — — ss. 2, 24, sub-s. 3. REX *v.* LICENS-
ING JUSTICES OF ROYAL LEAMING-
TON SPA - - - Divl. Ct. 328

1918.

Income Tax Act (8 & 9 Geo. 5, c. 40), sch. E.,
r. 1. CALVERT (INSPECTOR OF
TAXES) *v.* WAINWRIGHT
Atkinson J. 526

— — — sch. D., r. 4. PHILLIPS (INSPECTOR
OF TAXES) *v.* BOURNE
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— — — All Schedules Rules, r. 16.
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OF TAXES) - - - C. A. 17

1920.

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c. 17), s. 5, sub-s. 6. THORNE *v.*
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— — — s. 17, sub-s. 2. SMITH *v.* POULTER
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— — — s. 15, sub-s. 3. WATSON *v.*
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— s. 12, sub-s. 1 (a). ROBERTS v. JONES - - - C. A. 221

— s. 15, sub-s. 3. WRIGHT v. ARNOLD C. A. 280

— s. 15, sub-s. 1. BELL LONDON AND PROVINCIAL PROPERTIES, LD. v. REUBEN - - C. A. 157

— s. 12, sub-s. 2, proviso (j). ARTILLERY MANSIONS, LD. v. MABARTNEY Denning J. 594

— s. 15, sub-s. 3. OAK PROPERTY COMPANY LIMITED v. CHAPMAN AND ANOTHER - - C. A. 886

1921.

Police Pensions Act (11 & 12 Geo. 5, c. 31), s. 2, sub-s. 1 (c). POLICE AUTHORITY FOR HUDDERSFIELD v. WATSON Divl. Ct. 842

1923.

Agricultural Holdings Act (13 & 14 Geo. 5, c. 9), ss. 12, sub-ss. 1, 6; 16, sub-ss. 1, 2; 57, sub-ss. 1, 2; sch. II. PRESTON v. NORFOLK COUNTY COUNCIL C. A. 775

Rent and Mortgage Interest Restrictions Act (13 & 14 Geo. 5, c. 32), s. 10, sub-s. 1. ARTILLERY MANSIONS, LD. v. MABARTNEY Denning J. 594

1924.

Agricultural Wages (Regulation) Act (14 & 15 Geo. 5, c. 37). BOMFORD v. SOUTH WORCESTERSHIRE ASSESSMENT COMMITTEE AND OTHERS C. A. 575

1925.

Criminal Justice Act (15 & 16 Geo. 5, c. 86), s. 24, sub-s. 1. REX v. JUSTICES OF BODMIN. *Ex parte* McEWEN Divl. Ct. 321

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— s. 2, s. 64, sub-ss. 1 and 2. WILTSHIRE COUNTY VALUATION COMMITTEE v. BOYCE. WILTSHIRE COUNTY VALUATION COMMITTEE v. MARLBOROUGH AND RAMSBURY RATING AUTHORITY AND ORCHARD Divl. Ct. 950

1926.

Adoption of Children Act (16 & 17 Geo. 5, c. 29), sub-s. 3. H. v. H. Divl. Ct. 463

Housing (Rural Workers) (16 & 17 Geo. 5, c. 56), s. 3, sub-s. 1. ROBERTS v. JONES - - - C. A. 221

1927.

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1928.

Rating and Valuation (Apportionment) Act (18 & 19 Geo. 5, c. 44), s. 3, sub-ss. 1 and 2. A. RICHARDSON & SON v. MIDDLESBROUGH BOROUGH ASSESSMENT COMMITTEE AND ANOTHER Divl. Ct. 958

1929.

Local Government Act (19 & 20 Geo. 5, c. 17), s. 72. BOMFORD v. SOUTH WORCESTERSHIRE ASSESSMENT COMMITTEE AND OTHERS - - C. A. 575

1930.

Road Traffic Act (20 & 21 Geo. 5, c. 43). REX v. COLLINS - C. C. A. 560

— s. 15. THOMSON v. KNIGHTS Divl. Ct. 336

— s. 35, sub-s. 2. LABRUM v. WILKINSON - - - Divl. Ct. 816

— s. 35. JOHN T. ELLIS, LD. v. WALTER T. HINDS Divl. Ct. 475

— s. 35. KNOWLER v. RENNISON Divl. Ct. 488

— s. 15, sub-s. 2. WHITTALL v. KIRBY - - - Divl. Ct. 194

— s. 11, sub-s. 1. BRACEGIRDLE v. OXLEY - - - Divl. Ct. 349

— s. 48. STIMSON v. PITT Divl. Ct. 668

1932.

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1933.

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c. 51), s. 228, sub-s. 1. DICKSON v.
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c. 25), s. 3, sub-s. 2. DENERLEY v
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*Rent and Mortgage Interest Restrictions
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— s. 3, sub-s. 1, sch. 1. BELL LONDON
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— s. 3, sub-s. 1, sch. 1, para. (g).
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— sch. 1, para. (h). BAKER v. LEWIS
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1934.

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c. 58), s. 26, sub-s. 1 (a). I.T.P.
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1935.

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*Law Reform (Married Women and Tort-
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— s. 6, sub-s. 1 (c). HORDERN-
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1936.

Housing Act (26 Geo. 5 & 1 Edw. 8, c. 51),
s. 97. RODWELL v. MINISTER OF
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Public Health Act (26 Geo. 5 & 1 Edw. 8,
c. 49), s. 75, sub-s. 1. CROYDON
CORPORATION v. THOMAS
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— s. 37, sub-s. 1. CHESTERTON RURAL
DISTRICT COUNCIL v. RALPH
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1937.

Factories Act (1 Edw. 8 & 1 Geo. 6, c. 67),
s. 60, sub-s. 1; s. 159, sub-s. 1.
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OTHERS - - - C. A. 901

— s. 26, sub-s. 1; s. 102 and s. 152,
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HAYWARD LIMITED AND ANOTHER
Denning J. 918

— s. 130, sub-s. 2, s. 137. CARR v.
THE DECCA GRAMOPHONE CO., LD.
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v. DONOVAN - - - Divl. Ct. 326

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TION - - - Morris J. 821

1938.

Evidence Act (1 & 2 Geo. 6, c. 28), s. 1,
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Divl. Ct. 655

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s. 84, sub-s. 5. FOLLETT v. LUKE
Divl. Ct. 289

*Increase of Rent and Mortgage Interest
(Restrictions) Act* (1 & 2 Geo. 6,
c. 26), s. 7, sub-s. 1. WRIGHT v.
ARNOLD - - - C. A. 280

1939.

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(2 & 3 Geo. 6, c. 72), ss. 6, 15,
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HOUSE - - - C. A. 234

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— s. 21. HOGG v. SCOTT
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1940.

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ment Act* (3 & 4 Geo. 6, c. 17),
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1941.

*Landlord and Tenant (War Damage) (Amend-
ment) Act* (4 & 5 Geo. 6, c. 41), sch.
GOODMAN v. ELKINGTON AND BACK-
HOUSE - - C. A. 234

Liabilities (War-Time Adjustment) Act (4 & 5
Geo. 6, c. 24), s. 10, sub-s. 2. *In re*
THE AFFAIRS OF BRETT-PITT
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1943.

Pensions Appeal Tribunals Act (6 & 7
Geo. 6, c. 39), s. 6. JAMES v.
MINISTER OF PENSIONS
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— BRAIN v. MINISTER OF PENSIONS.
WILKES v. MINISTER OF PENSIONS
Denning J. 625

*Town and Country Planning (Interim
Development) Act* (6 & 7 Geo. 6,
c. 29), s. 5. TAYLOR v. BRIGHTON
BOROUGH COUNCIL - Divl. Ct. 57
C. A. 736

— s. 5, sub-ss. 1 and 5. CAPPER v.
WILLIAMS - Divl. Ct. 994

1944.

Liabilities (War-Time Adjustment) Act,
(7 & 8 Geo. 6, c. 40), sch. II. *In re*
THE AFFAIRS OF BRETT-PITT
C. A. 124

Reinstatement in Civil Employment Act
(7 & 8 Geo. 6, c. 15), s. 9, sub-ss. 1,
2, s. 10, sub-s. 1. REX v. LUDLOW,
Ex parte BARNSELY CORPORATION
Divl. Ct. 634

Town and Country Planning Act (7 & 8
Geo. 6, c. 47), s. 1. *In re* CITY OF
PLYMOUTH (CITY CENTRE) DECLAR-
ATORY ORDER, 1946. ROBINSON v.
MINISTER OF TOWN AND COUNTRY
PLANNING - - C. A. 702

Validation of War-Time Leases Act (7 & 8
Geo. 6, c. 34), s. 1. FOOT CLINICS
(1943), LD. v. COOPER'S GOWNS, LD.
Denning J. 506

1945.

Building Materials and Housing Act (9 & 10
Geo. 6, c. 20), ss. 7, 9, sub-s. 3.
REX v. EDWARDS. *Ex parte*
JOSEPH - - Divl. Ct. 392

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Furnished Houses (Rent Control) Act (9 & 10
Geo. 6, c. 34), s. 2, sub-s. 1; s. 12,
sub-ss. 1 and 2. REX v. HAMPESTEAD
AND ST. PANCRAS FURNISHED
HOUSES RENT TRIBUNAL. *Ex parte*
ASCOT LODGE, LD. Divl. Ct. 973

— s. 7. REX v. PADDINGTON AND
ST. MARYLEBONE RENT TRIBUNAL.
Ex parte BEDROCK INVESTMENTS,
LD. - - Divl. Ct. 984

REGULATIONS, RULES AND ORDERS JUDICIALLY CONSIDERED

County Court Rules, 1936, *Or.* 24, *r.* 18.
SOPHIAN *v.* A. J. CLIFFORD & SON
C. A. 212

Defence (General) Regulations, 1939, *reg.* 68CB
(*St. R. & O.* 1945, No. 1452)
OUZMAN *v.* KENNEDY **C. A. 395**

Eggs (Control and Prices) (Great Britain)
Order, 1944 (*St. R. & O.* 1944,
No. 502), *arts.* 7, 13; *sch.* 2;
part 2. BRIERLEY *v.* PHILLIPS.
BRIERLEY *v.* BREAR **Divl. Ct. 541**

Electricity Supply Regulations, 1937 (made
by the *Electricity Commissioners*
under the *Electricity Supply Acts*,
1882-1936). HEARD *v.* BRYMBO
STEEL CO., LD. AND OTHERS
C. A. 692

*Essential Work (Building and Civil Engineer-
ing) Order*, 1942 (*St. R. & O.*, 1942,
No. 2044), *art.* 4 (1) (d). HENDER-
SON *v.* ROCK ASPHALT CO., LD.
C. A. 167

*Essential Work (Building and Civil Engineer-
ing) Order*, 1944 (*St. R. & O.*, 1944,
No. 1435), *art.* 3. HENDERSON *v.*
ROCK ASPHALT CO., LD. **C. A. 167**

Essential Work (General Provisions) (No. 2)
1942 (*St. R. & O.*, 1942, No. 1594),
art. IV. (1) (d). DUFFIELD *v.* GREAT
WESTERN RY. CO.
Wrottesley J. 136

Essential Work (Coalmining Industry)
Order, 1943 (*St. R. & O.*, 1943,
No. 505), *art.* 4 (1) (d). WASSELL *v.*
WEST CANNOCK COLLIERY CO., LD.
C. A. 113

"*Judge's Rules*," *r.* 8. REX *v.* MILLS AND
LEMON - - - **C. C. A. 297**

London Cab Order (St. R. & O., 1934,
No. 1346), *regs.* 34, 40. GOODMAN
v. SERLE - - - **Divl. Ct. 808**

*Operations at Unfenced Machinery Regula-
tions*, 1938 (*St. R. & O.*, 1938,
No. 641), *regs.* 1, 2, 5. NASH *v.*
HIGH DUTY ALLOYS, LD. **C. A. 377**

*Pedestrian Crossing Places (Traffic) Regula-
tions (St. R. & O.*, No. 397), *reg.* 3.
UPSON *v.* LONDON PASSENGER
TRANSPORT BOARD - **C. A. 930**

Police Regulations (St. R. & O., 1920, No.
1484). HOGG *v.* SCOTT
Cassels J. 759

R. S. C. Order 22, r. 14, sub-r. II. GOODWIN
AND ANOTHER *v.* STORRAR
Denning J. 457

— *Or.* 16, *r.* 46. LEAN *v.* ALSTON
C. A. 467

— *Or.* 55E, *r.* 2, *sub-r.* I. JAMES *v.*
MINISTER OF PENSIONS
Denning J. 867

— *Or.* 36, *r.* 40; *Or.* 65, *r.* 27, *sub-r.* 48.
WRIGHT *v.* BENNETT AND ANOTHER
Denning J. 828

Shipbuilding Regulations (St. R. & O.,
No. 133). HARTWELL *v.* GRAYSON
ROLLO AND CLOVER DOCKS, LIMITED
AND OTHERS - - **C. A. 901**

Summary Jurisdiction Rules (St. R. & O.,
1915, No. 200/L. 12), *r.* 52. MOORE
v. HEWITT - - **Divl. Ct. 831**

Traffic Signs (Size, Colour and Type)
Provisional Regulations (dated
December 22, 1933), reg. 28. STIM-
SON *v.* PITT - - **Divl. Ct. 668**

Woodworking Machinery Regulations, 1922
(*St. R. & O.*, 1922, No. 1196),
regs. 10 (b) (ii) (c). CARR *v.* THE
DECCA GRAMOPHONE CO., LD.
Divl. Ct. 728

— — — *regs.* 10 (c), 21, 23. CAKEBREAD *v.*
HOPPING BROTHERS (WHETSTONE),
LD. - - - **C. A. 641**

ROYAL WARRANT JUDICIALLY CONSIDERED

1943, *art.* 4 (3). EDWARDS *v.* MINISTRY OF
PENSIONS - **Denning J. 564**

ERRATA.

Szalatnay-Stacho v. Fink. Solicitors for defendant were *Dehn and Lauderdale* and not as stated at p. 16.

Ellen Pope v. St. Helen's Theatre, Ltd., p. 30, at p. 38, six lines from bottom of page. For "first cause" read "joint cause."

Minister of Works and Planning v. Henderson, p. 91. At p. 92, ll. 2 and 12, for "Minister of Health and Planning" read "Minister of Works." The references to the relevant Minister in the title and text of the report were taken from the record in this case. According to the Minister of Town and Country Planning Act, 1943 (6 & 7 Geo. 6, c. 5), 2nd schedule, the references should read to "Minister of Works" instead of to "Minister of Works and Planning."

Watson v Saunders-Roe, Ltd., p. 447, ll. 4 and 5. Transpose "*Tilbrook & Hunt, Woking*" and "*Sherwood Cobbing & Co., Kingston-on-Thames.*"

Parker v. Boggon, p. 349. Solicitors for defendant should read "*Nordon & Co.*"

Denerley v. Spink, pp. 768-774. Was reported by R. F. Stubbing, Esq., Barrister-at-Law.

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION

SZALATNAY-STACHO v. FINK.

Defamation—Libel—Absolute or qualified privilege—Parties Czech nationals—Letter containing charges and dossier sent by General Prosecutor of Czechoslovak Military Court of Appeal to Military Office of Czech President in London—Military tribunal no jurisdiction over charges—Act of State—No action or prosecution founded on libel available under Czech law—Comity of nations—British and not Czech law applicable—Duty of defendant—No proof of malice.

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May 23, 24,
27, 28, 29;
June 5.

Scott,
Somervell and
Cohen L.JJ.

In November, 1941, the defendant F., who was then Public or General Prosecutor of the Czechoslovak Military Court of Appeal, a tribunal established in this country under the Allied Forces Act, 1940, wrote and dispatched a letter to the Military Office of the President of the Republic of Czechoslovakia (the Government of which, owing to the occupation of that country by the Germans, was functioning in London) concerning the activities of the plaintiff S, who at that time was the Acting Minister in Cairo of the Czechoslovak Government. The letter enclosed a number of written statements taken from Czech soldiers, and the plaintiff complained that it charged him with serious criminal offences, disloyalty to his country, and with being unfit to be employed in the Czechoslovak diplomatic service. The defence contained no

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plea of justification, and the plaintiff's action for libel proceeded on the footing that none of the charges was well founded, but the defendant pleaded absolute, or alternatively qualified, privilege. Evidence was given, and accepted by the trial judge, that under Czech law no action or prosecution founded on libel could be brought against a state official who was acting as such. His Lordship held that the comity of nations required him to apply Czech law and he therefore found that the communication was absolutely privileged. He added that the action must fail if the privilege were only qualified because in his view there was no malice on the part of the defendant. On appeal:—

Held, that the principle of the comity of nations, which under British law was based on public interest, did not compel or entitle the courts of this country to apply Czechoslovak law to acts done in this country, in proceedings in tort between Czechoslovak citizens, that law giving a general protection in civil suits to acts done by officials which was not afforded by British law; that the document was too remote to be a step in criminal proceedings and therefore the plea of absolute privilege failed; but that the alternative defence of qualified privilege succeeded, for the defendant, having had information placed before him, was clearly under a duty to transmit it to those who had a common interest and duty with him in the matters in question, and it was not proved that he had been actuated by malice.

Hart v. Gumpack (1872) L. R. 4 P. C. 439 distinguished.

APPEAL from Henn-Collins J.

In 1941 the plaintiff was the Czechoslovak Acting Minister in Egypt, and the defendant was the General Prosecutor of the Czechoslovak Military Court of Appeal, a tribunal established in this country under the Allied Forces Act, 1940. On November 17, 1941, the defendant wrote and dispatched a letter, marked as being confidential, to the Military Office of the President of the Republic of Czechoslovakia, the government of which, owing to the occupation of that country by the Germans, was then functioning in London. The defendant wrote: "The general prosecutor received on "several occasions information from members of the Czechoslovak Army in England regarding the activities of the "Czechoslovak envoy in Cairo. Dr. Szalatnay-Stacho. The "above-named being a civil person, the general prosecutor "could not institute criminal proceedings and has, therefore, "ordered administrative examinations of all persons who "could elucidate the question. The contentions of Corporal "Milos Kuva, which are supported in particular by the "statement of Lt.-Col. Joseph Bartik as regards the opinion "of the French and English Intelligence Service, of the above-

" named Czechoslovak envoy are so grave that the general
 " prosecutor considered it his duty to bring the matter to the
 " notice of the President of the Republic. The envoy
 " is accused of the following " (then followed four paragraphs
 each of which set out one or more sections of the Czechoslovak
 criminal law which it was alleged had been contravened).
 Enclosed in the letter were written statements taken from
 Czech soldiers touching the activities of the plaintiff in Egypt
 while he was on diplomatic service there, the greater part of
 which statements consisted of hearsay.

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The plaintiff brought the present action for libel, alleging
 that by the communication he was charged with serious
 criminal offences, disloyalty to his country and with unfitness
 to be employed in the Czechoslovak diplomatic service. The
 action proceeded on the footing that none of the charges was
 well founded. The defendant did not plead justification, but
 relied on the plea of privilege, absolute or qualified. Evidence
 was given on his behalf, and accepted by the trial judge, that
 an action founded on libel was inconceivable under Czech law
 as against a defendant who was a state official and acting as
 such. On December 19, 1945, Henn-Collins J. dismissed the
 action, holding that the communication was absolutely
 privileged. The plaintiff appealed.

Beney K.C., Sir Valentine Holmes K.C. and John Foster for
 the plaintiff: The learned judge below came to a wrong
 decision. He held that the comity of nations required him to
 apply the law of Czechoslovakia, under which the occasion
 in question was one of absolute privilege; further, that there
 was no proof of express malice on the part of the defendant
 and therefore even if there was only qualified privilege the
 claim failed. If this court holds that the occasion is within
 the ambit of qualified privilege the plaintiff will contest the
 finding of the learned judge as to malice. There was no duty
 on the defendant to do more than report to the proper quarter
 the offences of which he had heard. He in fact went out of
 his way to collect statements and level charges against the
 plaintiff and that implies malice. The doctrine of absolute
 privilege is not applicable to a case like this. It is based on
 public policy, which cannot be concerned with communications
 between Czech officials [*Aksionairnoye Obschestvo A. M.*
Luther v. James Sagor & Co. (1) and *The Jupiter* (No. 3) (2)]

(1) [1921] 3 K. B. 532.

(2) [1927] P. 122, 250.

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referred to.] *Hart v. Gumpach* (1) is distinct from the present case. The judgment of the Board contains a dictum (2) to the effect that, if by the law of a foreign state officers of its government are absolutely protected in making reports concerning their subordinates, it might be proper to hold that it would be contrary to the comity of nations, and therefore against our own public policy, to allow an action on such a report to be maintained in this country. If this alleged libel had been published in Czechoslovakia, that dictum, if right, might be applicable to this case. In *Hart v. Gumpach* (1) the action was brought in China, and absolute privilege was claimed by the local law to acts done in China. Here it is sought to apply the absolute privilege which the law of Czechoslovakia affords to acts done in this country.

[SOMERVELL L.J. : Does that case not show that if a document is privileged as between two foreign officials, or cannot be sued on in a foreign country, public policy will demand a similar immunity here ?]

The foundation of absolute privilege is the security of the British State. It has never yet been applied to the communications of a foreign State, and would not, for example, apply to communications between two Czech ministers resident in the United Kingdom. It was a mistake on the part of Henn-Collins J. to introduce the question of comity, at all (see Dicey's Conflict of Laws, 5th ed. p. 7 and *In re Amand* (No. 2) (3). In *Dawkins v. Lord Rokeby* (4) it was held that a witness before a military court of inquiry was protected in regard to statements made by him in the same way as a witness in any other judicial proceeding ; but the question was left open whether it is right to say that the acts of a military official done in his military capacity are not cognizable in courts of justice. See *Fraser v. Balfour* (5). In *Heddon v. Evans* (6), however, it was held that a military officer was liable to an action for damages if, in exercise of his jurisdiction, he committed an act which amounted to a common law wrong to another person, even though he purported to act in the course of military discipline. In *M. Isaacs & Sons, Ltd. v. Cook* (7), Roche J. quoted with approval the law in relation to absolute privilege as stated in Fraser on Libel and Slander,

(1) (1872) L. R. 4 P. C. 439.

(2) Ibid. 465.

(3) [1942] 1 K. B. 445.

(4) (1875) 7 L. R. 7 H. L. 744.

(5) (1918) 34 T. L. R. 502.

(6) (1919) 35 T. L. R. 641, 643.

(7) [1925] 2 K. B. 393, 395.

6th ed. p. 196, where it is said that "for reasons of public policy, the same protection" (i.e., absolute privilege) "would no doubt be given to anything in the nature of an act of State, for example, to every communication relating to State matters made by one minister to another, or to the Crown." In the present case the letter of November 17, which is relied on, was not an act of State. Assuming, however, that the doctrine of absolute privilege applies to foreigners in this country, if the officials in question were British officials, and e.g., the Judge Advocate General were passing on information to the Prime Minister or his Secretary, the letter would not be covered by the doctrine of absolute privilege as being a statement made in the course of a judicial inquiry. The matter had never reached that stage. The letter of November 17 was written to comply with the defendant's duty as a private citizen to send on information regarding serious offences which he thought had been committed, and no absolute privilege attached to it. As to whether there was qualified, as opposed to absolute, privilege, assuming it to be the duty of any citizen hearing of a crime to notify the proper authority, it is submitted that the following principles apply: (1.) The duty does not extend to formulating charges against the person concerned; (2.) the duty does not require any investigation to be made by the person reporting, or the passing on to the authority the results of any self-imposed task of investigation; (3.) to create qualified privilege it must be shown that the authority to whom the statement is published has a reciprocal duty to receive it; (4.) the fact that the publisher of the statement may bona fide have thought that he was under a duty to make the statement is not enough. [*Slade K.C.*: It is conceded for the defendant that propositions 3 and 4 are correct in law.] As to (1.), when the libel is examined it is clear that the defendant himself intended to make those charges. As to (2.) if the defendant is under a duty to make an investigation, he must do so fairly, and yet no person in Egypt was examined. See the observations of Lord Dunedin in *Adam v. Ward* (1) referring to the criterion whether an occasion is privileged as stated in Park B.'s judgment in *Toogood v. Spyring* (2). If this was an occasion of qualified privilege the evidence shows that the defendant was actuated by express malice.

SCOTT L.J. We need not trouble you, Mr. Slade, on the

(1) [1917] A. C. 309, 328-9.

(2) (1834) 1 Cr. M. & R. 181,
193.

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C.A. question of this being an occasion of qualified privilege or on the question of malice.

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Slade K.C. and *Arthian Davies* for defendant. The point advanced by the trial judge that by the comity of nations—since this communication could not have founded any action or prosecution against the defendant under Czech law—it was against the public interest of this country to entertain a suit involving an inquiry into this communication, was not and is not taken by the defendant. Nor is it contended that the communication was privileged as being an act of State of the Czech Government. There is apparently no authority extending absolute privilege to a communication relating to State matters made by one officer of State to another, in the course of his official duty, at a lower level than that shown in *M. Isaacs & Sons, Ltd. v. Cook* (1) (report of High Commissioner of Australia in the United Kingdom to the Prime Minister of Australia).

This communication, it is submitted, was a step in judicial proceedings and, as such, absolutely privileged. If Mr. Beney is right, that on the true construction of the covering letter the defendant was making charges against the plaintiff, it is clear that this is so. A letter of complaint against a solicitor, in respect of his professional conduct, to the Law Society is absolutely privileged: *Lilley v. Roney* (2). This immunity extends to the unsworn statement of a witness communicated to the solicitor of a party as the basis for his proof: *Watson v. M'Ewan* (3) and *Beresford v. White* (4). Lord Halsbury said in *Watson v. M'Ewan* (5): "It is very obvious that "the public policy which renders the protection of witnesses "necessary for the administration of justice must, as a "necessary consequence, involve that which is a step towards "and is part of the administration of justice, namely, the "preliminary examination of witnesses to find out what "they can prove." The basis of this absolute protection is that witnesses are to be spared an inquiry whether what they propose to testify is malicious. There is no ground for distinguishing between a proof taken in the course of the proceedings and one taken before the commencement of proceedings. Take, for example, the case of a proof in a slander case where the actual words said to have been used by the

(1) [1925] 2 K. B. 391. (4) (1914) 30 T. L. R. 591.

(2) (1892) 61 L. J. (Q. B.) 727. (5) [1905] A. C. 480, 487.

(3) [1905] A. C. 480.

defendant are of vital importance. A signed proof must be taken of a witness to the words spoken, before the solicitor for the plaintiff takes the opinion of counsel. See the observations of G. Spencer Bower in his work on "Actionable Defamation" (2nd ed.) at pp. 91 to 92 and the cases cited in note (h.). The learned author writes that the expression "published in the course and for the purposes of any judicial proceeding" "does not apply to or include any publication of defamatory matter before the commencement or after the termination of the judicial proceedings, unless such publication is an act incidental to the proper initiation thereof or the giving legal effect thereto." This communication was an act incidental to the proper initiation of judicial proceedings.

[COHEN L.J.: Admittedly this communication could not have been directed to proceedings in a military court, and there was no Czech civil court functioning in London. It could at most be directed to some executive action. It is very difficult in those circumstances to say that this communication was a report which could properly be considered as a step in judicial proceedings.]

The step might, however, have been necessary to bring the whole complaint to the notice of the President of Czechoslovakia at the earliest possible time, although, owing to the exigencies of the war, there was no possibility of action being taken against a civilian until the termination of hostilities. It would not, it is submitted, be any less "a step" because an inquiry would not be possible for a considerable time. There is no evidence that the President of Czechoslovakia is the head and fountain of justice in that country, but it is submitted that he must be assumed to be so, and this communication was a step taken with a view to the initiation or possible initiation of proceedings by the person whose function it was to make the decision. In *Hudson v. Pare* (1) a statement made to a justice of the peace to whom an application in lunacy was made was held to be a preliminary step in judicial proceedings. Publication by a client to a solicitor or even potential solicitor when seeking legal advice has also been held to be absolutely privileged: *More v. Weaver* (2). A person who has a legal duty to perform as a step towards the initiation of judicial proceedings and who sends a communication to the quarter having power to initiate such proceedings is absolutely privileged: *Hart v. Gumpach* (3) is the only authority on the

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(1) [1899] 1 Q. B. 455.

(3) L. R. 4 P. C. 439, 465.

(2) [1928] 2 K. B. 520.

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application of the comity of nations. The observations of the Privy Council in that case are, it is true, merely obiter dicta, but they are in accordance with common sense and with what should be, if it is not, the law of this country. It was only by reason of the fortuitous circumstance that the President and Judge Advocate of Czechoslovakia were both resident in this country as allies and guests of His Majesty that the plaintiff was able to bring the present action, although no such action would lie in Czechoslovakia. Comity is a matter for the discretion of each State, and if ever there was a case where a nation should extend to the officials of an allied and friendly nation the protection afforded by absolute privilege, it is the present case. Public interest is the foundation of absolute privilege and it is the public policy of this country that nationals who would not be subject to inquiry in their own country should not be subject to inquiry here. The only materiality of the evidence as to Czech law is the ascertainment of whether such a communication would be actionable in Czechoslovakia.

[*Dawkins v. Paulet* (1) and *Hare-Meller's case* (2) also referred to.]

Cur. adv. vult.

June 5. The judgment of the court was delivered by SOMERVELL L.J. This is an appeal by the plaintiff in a libel action which was tried before Henn-Collins J. The plaintiff, who is a Czechoslovak citizen, was Acting Minister in Cairo under the Czechoslovak Government from 1934 to 1944. The alleged libel is contained in a document dated November 17, 1941, signed by the defendant, with documents attached, and sent to the Military Office or Chancellery of the President of the Czechoslovak Republic. The defendant, who is also a Czechoslovak citizen, was at the material time Public or General Prosecutor of the Czechoslovak Military Court of Appeal, which was a court established in this country under the Allied Forces Act, 1940, the Czechoslovak Government being in this country at that time as our ally. Before the war he was a practising lawyer. The document is plainly defamatory of the plaintiff, and—to use a neutral expression—is concerned with very serious accusations against him in his official position as Acting Minister, including a charge of treason and other criminal offences. The defendant admits that he made and

(1) (1869) L. R. 5 Q. B. 94.

(2). (1588) 3 Leon. 138, 163.

sent the document ; he does not justify, but pleads that the words were published by him without malice and in the honest belief that they were true. He says that the occasion was one of absolute privilege, or, alternatively, of qualified privilege. Henn-Collins J. decided that the occasion was one of absolute privilege. If he was wrong about that, he would have held that there was qualified privilege and no malice.

The document of November 17, 1941, is marked "duv," which means confidential. It is headed : "The Military Office of the President of the Republic, London," and the first three paragraphs are as follows : [His Lordship read the first three paragraphs of the document and continued :] It proceeds : "The Envoy Dr. Szalatnay-Stacho is accused of "the following :—" There are then four paragraphs which may be summarized : (1.) That after March 15, 1939—the date of the German occupation of Prague—he established in Cairo connexion with the German Legation and committed the crime of treason ; (2.) That he embezzled £E.2,500 belonging to the Czech community in Egypt ; (3.) That he invited Czechoslovak workers to collaborate with the Germans and dissuaded Czechoslovak citizens from joining the Czechoslovak forces in France ; (4.) That in associating with or assisting three named Germans he committed certain further crimes, namely, fraud, military betrayal, and the misuse of official power. All the paragraphs refer to provisions of the code dealing with the offences in question. There are attached a number of statements. The first in date and the most detailed of the statements attached was by Corporal Kuva, who before the war was a merchant in Cairo.

On the issues as raised by the pleadings, the truth of the accusations or allegations in the statements attached to the defendant's document is not in issue. There are no grounds for any suggestion that they are true. Evidence was, however, admitted that in fact, after March 15, 1939, the plaintiff took a strong line diametrically the opposite of that of which he was "accused" as set out in para. 1 above, and was not guilty of the treason or disloyalty alleged. It is also, perhaps, fair to the plaintiff to point out that he retained his position under the President of the Czechoslovak Republic till 1944 and was receiving his salary when he gave evidence. Mr. Beney told the court that the plaintiff brought these proceedings in the hope that some plea would be raised which would enable the court to investigate the truth of these charges. This is

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understandable. On the other hand, it is perhaps right to say that on the view put forward by the defendant as to his part in the matter, which the court, agreeing with Henn-Collins J., substantially accept, we can find no ground for the criticism of his conduct in these proceedings which was, perhaps, suggested by Mr. Beney.

There is one matter of history which explains how the plaintiff came into possession of the document on which he relies. Before his appointment terminated, in 1944, he had heard some rumours of charges against him. When he came back to London he was told confidentially that the defendant had made charges against him. He saw an opinion of the legal adviser to his Foreign Office. This document, of which he had had a copy, was not disclosed, but he said that it dismissed the charges as pure nonsense. The plaintiff, who by this means had got some knowledge of what had happened, made an application to the District Prosecutor to the Court Martial of the Czechoslovak Army for a criminal prosecution of the Commander-in-Chief, the defendant, and other persons. This is a proceeding which has no exact parallel in our law, but appears to be a formal demand for a prosecution which was, in this case, for misuse of official power. This procedure is subject to an appeal. It was in the course of these proceedings that the plaintiff saw the actual document relied on. There was, as a result of the plaintiff's application, no prosecution, but he issued the writ in the present action. It has been necessary to refer to this in order to explain how these proceedings started and it also may have some relevance to the plaintiff's complaint of the defendant's attitude in these proceedings. The court is only concerned with the legal issues, but, if it is sought to base an argument on any failure of the defendant to express regret or take up a friendly attitude, it may be necessary to bear in mind the plaintiff's first action with regard to the matters with which the case is concerned.

Henn-Collins J. decided that the document was absolutely privileged. He based this part of the decision on a finding that in Czech law an action like the present could not be brought against the defendant by reason of the fact that he was a state official and acting as such. He decided that, by the comity of nations, His Majesty's courts should extend to communications such as this, passing between Czech nationals on Czech affairs, the same protection as their domestic courts

would afford. He relied on certain dicta in *Hart v. Gumpach* (1).

Before considering this reasoning, it is necessary, in order to deal with Mr. Slade's first argument under this issue, to consider the question on somewhat wider lines. The application of the principle of absolute privilege to foreign official documents is one on which there is little, if any, direct authority. The principle in our law is based on public interest, and, as it seems to us, would not necessarily apply to corresponding foreign documents. At the material time the Czechoslovak Government was in this country as our ally in the war. This was an unprecedented state of affairs. Whatever may be the position in normal circumstances it may well be that in these circumstances the public interest would justify the application to Czechoslovak official documents of the principle applied to our own documents. Accepting this principle, it is necessary to consider in the light of it, Mr. Slade's first submission on this part of the case, which was that this document should be protected as the first step in criminal proceedings. He referred to *Watson v. M'Ewan* (2) and to *Beresford v. White* (3) which held that a proof of a witness had absolute privilege; to *Lillie v. Roney* (4) where a letter to the Law Society in the form prescribed for initiating disciplinary proceedings against a solicitor was held absolutely privileged; to *Bottomley v. Brougham* (5) where the same principle was applied to the report of an official receiver to the court under the Companies Act. The case of *Dawkins v. Paulet* (6) does not seem to us to apply to the defendant's action here. In that case the defendant, a military officer, was acting strictly within his official military duties with reference to a court of inquiry on another officer. In the view we take of this document, it was not the first step in criminal proceedings. At that time there were no Czechoslovak courts available either here or in Czechoslovakia before which the plaintiff, not being a soldier, could be charged. Apart from this point, we think that, having regard to the document and its destination, its purport may be summarized as follows: "This information has come into my hand supplemented by certain statements I have taken from soldiers. The statements accuse the plaintiff of serious crimes, which are specified. I forward the dossier for investigation and any action that may be

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(1) L. R. 4 P. C. 439, 464.

(2) [1905] A. C. 480.

(3) 30 T. L. R. 591.

(4) 61 L. J. (Q. B.) 727.

(5) [1908] 1 K. B. 584.

(6) L. R. 5 Q. B. 94.

C. A. "thought proper." This, certainly, is far more remote from actual or contemplated proceedings than any of the cases cited. Mr. Slade did not argue that the document was protected as an act of State. He did rely on *Hare-Meller's* case (1). This was a case in 1588. It is very shortly reported, but it states that the exhibiting of a bill to the Queen is not in itself any cause of action, on the ground that the Queen is the head and fountain of justice, and, therefore, it is lawful for all her subjects to resort to her to make their complaints. The circumstances in which the bill was exhibited are not set out, but it is, in our view, impossible to regard the present document sent to the Military Chancellery of the President as coming within any such principle as that stated.

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Henn-Collins J. based his decision, as we have stated, on a different principle. Although the document was made and published in England, he felt that he must consider what would have been the rights of the parties if the action had come before a Czechoslovakian court. In *Hart v. Gumpach* (2) the observations were obiter and the position was, as it seems to us, essentially different. The action was brought before Her Majesty's Supreme Court for China. It was between two British subjects, both in the service of the Chinese Government, and was based on false representations alleged to have been made by the defendant in his official capacity in China. In that case, therefore, everything had happened in China, the country whose law it was suggested might be applied to the documents. Here everything happened in England. Having due regard to the exceptional position of the Czechoslovak Government, we do not think that the principle of the comity of nations compels or entitles the courts of this country to apply Czechoslovak law to acts done here, in proceedings in tort between Czechoslovak citizens, that law giving a general protection in civil suits to acts done by officials, which is not afforded under our law. This would be to make an inroad on a very fundamental principle. If there is to be such an application of foreign law in the circumstances set out it would, in our opinion, have to be expressly provided for by legislation. We, therefore, decide that this document was not absolutely privileged.

There remains the question of qualified privilege, and, if that is established, of malice. In the first place, it is necessary to be clear as to the relevance of Czechoslovak law. In our

(1) 3 Leon. 163.

(2) L. R. 4 P. C. 439.

opinion the principles of English law are applicable to a document produced and published in England. In considering whether there was a duty on which a plea of qualified privilege can be based, it is, of course, necessary to consider the position and duties of the defendant as an official of the Czechoslovak Government and the position of those to whom the document was published. The defendant's action started as a result of the statement made by Corporal Kuva. The plaintiff, not being in the military forces, was outside the defendant's jurisdiction. But no official, as it seems to us, would be justified in merely disregarding statements which suggested that a servant of the state had been guilty of disloyal action, if he honestly believed that they were or might be true. Mr. Beney was inclined to concede that, if the defendant had contented himself with passing on the original document to a proper authority, he could not have disputed that there would be a qualified privilege. He contended that what was done went beyond what privilege would protect. He submitted that the defendant had formulated charges, had himself initiated investigations, and passed on the result to the wrong authority. He said that the defendant, in a letter of March 22, 1944, had stated that he relied on an article in the Military Code of Procedure which did not apply, and that in evidence he said he had relied on a provision of the statute law which did not cover what he had done.

These points have to be considered, but the general circumstances require to be clearly kept in mind. An official had information put before him alleging disloyalty and treason by another official who was under another department. Unless he had grounds for knowing the allegations were false, it was, in our opinion, clearly his duty to act. Mr. Beney submitted firstly that he had exceeded his duty in having statements taken from a soldier who was referred to in the Kuva document, and later from other soldiers who, it was said, might have knowledge of the events in question. In his official capacity he was in a position to set in motion machinery for getting statements from soldiers. In our opinion, he was justified in taking this course. The allegations were serious, and the defendant stated in the letter, already referred to, of March 22, 1944, that there was at that time no department of the Ministry of the Interior dealing with state security. The further statements might have supported, added to, or weakened the case as put forward in the original documents.

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Having got this material, it is said he formulated charges in the document of November 17, which he signed, referred to at the beginning of this judgment. In the statement of claim the various statements attached to that document take up some seventeen pages of fairly close typescript. It would seem clear that, in forwarding material of this kind to a higher authority, any official would summarize its effect. In our opinion, this document is not, as was suggested, a formulation of charges which the defendant is putting forward on his own responsibility, but a summary of the charges made in the documents, with the addition of references to what the defendant regarded as the material sections of the criminal code. It was said that the charges as formulated went beyond the evidence, including hearsay, of the statements. We are doubtful whether this is so, but, in any event, we are satisfied it was an honest attempt to summarize the accusations. From the defendant's point of view these would fall to be considered by those to whom the document was sent in the light of any information they already had and any further investigations they chose to make.

Complaint was also made that the defendant had not made inquiries of other departments, including the Ministry of Foreign Affairs, where there would be the plaintiff's own reports as to his conduct, and, very likely, other information supporting his actions. The defendant, however, realized, quite rightly, that, the plaintiff being a civilian, it was not a case of which he could take charge. We have already stated our view as to the statements he took from soldiers. He might well have been exceeding his duty if he had sought to carry out a wider investigation. Looking at the matter in the light of the general principles of our law, we do not regard either of these points as destroying the claim of privilege. A good deal of argument and cross-examination was devoted to showing that the defendant had exceeded his statutory duties under Czechoslovak law. It was pointed out that he had no statutory duty to investigate charges and take statements except in cases where the charge under consideration was against a soldier. In his evidence, though not in a letter he had previously written, he said he acted under para. 12 of the Defence of the Republic Act. That paragraph makes it a criminal offence if any person who obtains knowledge in a credible manner that certain specified offences have been committed fails to report to authority. The specified offences include some, but by no means all, of the offences referred to

in the document sued on. Mr. Beney, therefore, pointed out that this paragraph did not cover the defendant's action. He relied on the inconsistency between this evidence and the statements in the letter of March 22, 1944, previously referred to. It is obvious that the duty sufficient to support a plea of qualified privilege goes far wider than duties the breach of which is a crime. The evidence of the defendant was given through an interpreter under considerable difficulties to counsel and, probably, to the witness. There may well have been some confusion in the witness's mind when he was asked under what "powers" he made his report. It may well be that the only duty enforceable by criminal sanction to which he could refer was the paragraph in question. The court has, however, to have regard to all the circumstances in deciding whether there was a duty sufficient to support qualified privilege. The fact that he honestly thought he was under a duty does not avail him, nor would a mistake as to the basis and extent of his duty, or the nature of the duty sufficient under our law to support a claim of privilege, be fatal, though it might be relevant on the question of malice.

In considering this question, we have to apply English law, having due regard to the defendant's position and obligations as an official of the Czechoslovak Government. We have already dealt with the main grounds on which Mr. Beney submitted that he exceeded the limits or abused the occasion of the alleged privilege. We have considered all the points put, including some which were more stressed on the issue of malice but may have some relevance to the present question. Having regard, on the one hand, to the fact that the plaintiff was a civilian and, therefore, outside the defendant's official duties as a prosecutor, and, on the other, to the defendant's position as a military officer holding a responsible position and bound to take action on the information put before him, we do not think he did more than was his duty in the circumstances.

Mr. Beney took a further point, that he ought not to have sent the document to the Military Office or Military Chancellery of the President. We think there is nothing in this point. The defendant had information that some of the matters dealt with had previously been reported to the President. Being himself a military officer, it seems to us perfectly natural and proper that he should have sent it as he did to the Military Chancellery of the President. In our view, those to whom the document was sent had a common interest and duty with the defendant in the matters in question.

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There remains the issue of malice. There was no suggestion of any personal ill-will extraneous to the actual acts which have been set out. Henn-Collins J. formulated the issue in this way : " Given the occasion, was the defendant using it in " singleness of mind in pursuance of his duty, or was he not ? " That, of course, is a question of fact. After reviewing the evidence he says : " First and last I have to ask myself whether " the defendant was acting in good faith ; and I am convinced " that he was." The matter was re-argued before us. We do not think it necessary to deal with all the points in detail, some of which have already been dealt with when considering privilege. We will say a few words about one matter which was pressed upon us. Much of the material is hearsay, and one document purporting to set out an earlier " suspicion " of the Intelligence Service was said to be scandalous and irrelevant hearsay. Mr. Beney submitted as evidence of malice that the defendant had sent forward all these documents, and had not made a selection. We do not think this affords any evidence of malice. We think he was clearly right to forward the whole file. One may take as an example the intelligence report complained of and accept everything that Mr. Beney said about it. It was not suggested that the defendant had concocted it, nor, indeed, was he asked how it came into his possession. If higher authority in the course of its investigations became aware how groundless these suspicions were, it might well desire to investigate how they came to be put forward. It seems to us entirely consistent with the defendant's duty that he put forward everything which he had received. It would, of course, require strong reasons to induce us to differ from Henn-Collins J. who saw the defendant and heard him, albeit through an interpreter, give his evidence. Having heard the arguments and considered the evidence we fully agree with his conclusion.

In the result, the court is of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff : *Dehn, Lauderdale & Weedon.*

Solicitors for defendant : *Blyth, Dutton, Hartley & Blyth.*

A. W. G.

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KING'S BENCH DIVISION.

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—“Living separate from her husband”—Income from property
outside the United Kingdom—Assessment—Income Tax Act, 1918
(8 & 9 Geo. 5, c. 40), All Schedules Rules, r. 16.*

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By r. 16 of the All Schedules Rules under the Income Tax Act, 1918: “A married woman . . . being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried: Provided that—
“(1.) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name . . . and (2.) a married woman living in the United Kingdom separate from her husband, whether the husband be temporarily absent from her or from the United Kingdom or otherwise, who receives any allowance or remittance from property out of the United Kingdom, shall be assessed and charged as a feme sole if entitled thereto in her own right . . .”

A married woman, whose husband was serving abroad as an officer in the army, was assessed to income tax in respect of certain income received by her from property in America. The marriage was a happy one and the marital home in London was maintained during the husband's absence:

Held, that the wife, although “living with her husband” within the meaning of proviso (1.) to r. 16 of the All Schedules Rules, was at the material time “living separate from her husband” within the meaning of proviso (2.) and was therefore rightly assessed under that rule.

Decision of Macnaghten J. reversed.

APPEAL from Macnaghten J.

The respondent, a married woman, was an American citizen who was married to an Englishman in 1933. The marriage was at all times a happy one. The respondent lived with her husband in London until 1939, when he joined the army. Thereafter until 1941 the husband was stationed in various places in the United Kingdom, but in November, 1941, he was sent abroad and was absent from the United Kingdom for three years. During that time the wife continued to live in the marital home in London, which contained the husband's personal effects and was available to him whenever he was able to return to it.

The wife was entitled to a considerable income from property in America and for the year 1941-42 this amounted to 13,615*l.* of which 7,082*l.* was remitted to her in London and the balance of 6,533*l.* was retained in America. It was admitted that the

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whole of the wife's income became assessable for the year 1942-43 under Case 5 of sch. D. to the Income Tax Act, 1918. Assessments had previously been made on the husband in respect of all her income, but for the year 1942-43 an assessment was made on her in respect of the sum of 7,082*l.* received by her from America.

The wife appealed to the Special Commissioners and it was contended on her behalf that, she being a "married woman" living with her husband within the meaning of proviso (1.) to r. 16 of the All Schedules Rules, the income in question ought to have been assessed and charged in her husband's name. It was contended for the Crown that although the wife was "living with her husband" within the meaning of proviso (1.), she was "living separate from her husband" within the meaning of proviso (2.) to the rule and was therefore assessable as a feme sole in respect of the sum in question. The Commissioners accepted the contention of the Crown and dismissed the wife's appeal.

The wife then appealed to the High Court, and Macnaghten J. allowed her appeal.

The Crown appealed to the Court of Appeal.

Sir Frank Soskice S.-G., J. H. Stamp and R. P. Hills for the Crown.

Grant K.C. and Donovan K.C. for the wife.

Cur. adv. vult.

July 25. The following judgments were read :

SCOTT L.J. In this appeal the facts are clearly and sufficiently found by the commissioners and the only question in issue is one of interpretation of r. 16 of the All Schedules Rules in the Income Tax Act, 1918. The respondent before us is the wife of Lieut.-Colonel E. S. Nugent-Head. She was, under that rule, assessed and charged to income tax for the year 1942-43 in respect of the sum of 7,082*l.*, income received by her from her own possessions in the U.S.A. The question is whether she was rightly so charged. She and her husband had lived together happily in England since their marriage in 1933, but in November, 1941, he had been sent abroad on military duties overseas. There he remained, by military orders, for three years. There was no change in the marriage relations, except that caused by his physical absence : had it not been for

the military orders, he would have been at all relevant times living with her in the matrimonial home as before. In these circumstances, she appealed, without success, to the Special Commissioners and then to the King's Bench Division, where Macnaghten J. allowed her appeal. Hence the appeal by the Crown to this court. The total income received, or receivable, by her for the year upon which her assessment was based was 13,615*l.*, but the balance of 6,533*l.* was retained in America. There is no dispute as to amount, and it is conceded that the husband is in any event chargeable under Case V. with the 6,533*l.* and, if she succeeds in her present appeal, with the 7,082*l.* also. The only question for us is whether under r. 16 she is properly assessable and chargeable with the 7,082*l.*

The whole litigation is attributable, in my opinion, to the extraordinary ambiguity of the language used in proviso (2.) to r. 16; and the statutory history of that language shows how the reluctance of the Inland Revenue to see any Parliamentary change made in ancient wording to which they have got accustomed and of which they think (often rightly) they know the meaning (though the taxpayer probably does not) may lead to unnecessary disputes and therefore much public inconvenience. This is the rule: "A married woman acting as " a sole trader, or being entitled to any property or profits to " her separate use, shall be assessable and chargeable to tax " as if she were sole and unmarried: Provided that (1.) the " profits of a married woman living with her husband shall be " deemed the profits of the husband, and shall be assessed and " charged in his name, and not in her name or the name of her " trustee; and (2.) a married woman living in the United " Kingdom separate from her husband, whether the husband " be temporarily absent from her or from the United Kingdom " or otherwise, who receives any allowance or remittance from " property out of the United Kingdom, shall be assessed and " charged as a feme sole if entitled thereto in her own right, and " as the agent of the husband if she receives the same from or " through him, or from his property, or on his credit."

Before modern reforms of the law relating to the property of married women, the only event in which a married woman was taxed personally was if she was acting as a " sole trader." By the custom of the City of London, and possibly some others, she was then regarded as a feme sole. If she had equitable interests it was not herself, but her trustees, who were taxed. Both those positions were recognized in the early Income Tax

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Acts (1803, ss. 91 and 89 ; 1805, ss. 101 and 99 ; 1806, ss. 56 and 54 ; 1842, s. 45), the last adding the case of profits to which she was " entitled to her sole or separate use " ; but no question is raised in the present appeal on those words. In the case of " a married woman living with her husband " the husband alone is chargeable, because no other treatment of her would have been consistent with the ancient identification of the wife with the husband so far as rights of property were concerned. The statutory expression of the common law view appeared as a proviso in practically the same terms as in the present proviso (1.) to r. 16 (see, for instance, s. 91 of the Act of 1803). The present proviso (2.) first took shape in the latter part of s. 101 of the Act of 1805, which was as follows : " Provided " also, that any married woman living in Great Britain separate " from her husband, whether such husband shall be temporarily " absent from her or from Great Britain, or otherwise, who shall " receive any allowance or remittance from property out of " Great Britain, shall be charged as a feme sole, if entitled " thereto in her own right, and as the agent of the husband, " if she receive the same from or through him, or from his " property or on his credit." Mr. Grant's main argument for Mrs. Nugent-Head is that the word " separate " means and has always meant " separated," either judicially, or by deed, or at least to such a degree in fact as to show such disruption of the matrimonial home as would be recognized for some purpose or other in courts with matrimonial jurisdiction. It was further urged, with undoubted force, that the words " whether " the husband be temporarily absent from her or from the United " Kingdom or otherwise " are unintelligible ; and on that Mr. Grant invoked the principle that a taxing Act should be construed strictly, and not against the taxpayer. He therefore submitted that such unintelligible words should be disregarded. If the proviso had stopped short after the direction for charging her in respect of any allowance or remittance from property out of the United Kingdom as a feme sole, this argument might well have prevailed ; but that interpretation is, in my opinion, rendered impossible by the last two lines of the second proviso, which charge her " as the agent of her husband if she receives " the same "—i.e., the allowance or remittance from abroad—" from or through him or from his property or on his credit." The argument is made impossible because *ex hypothesi* she is " separate " from him when she so receives his money, and the receipt of money voluntarily sent by him is inconsistent with

the meaning of the word "separate" which is essential to the argument on her behalf.

When that provision was first added, namely, in 1805, many husbands went to India or the plantations, in search of a livelihood, and remained abroad for two or more years, and yet were in no sense breaking up the matrimonial home: on the contrary they were keeping it up and remitting money to their wives for the purpose of maintaining it. In other words, there was no such "separation" as the argument predicates is to be read into the word "separate." In the eye of the law the wife was still "living with her husband." This construction, which interprets the word "separate" as a synonym for "not living with the husband" in a merely local and factual sense, is the only one which is not inconsistent with the word "temporarily." What the words "or otherwise" were intended to cover I cannot guess; but the dominant idea is that the wife may be receiving money from her husband though "separate" and I therefore construe that word as merely representing the antithesis to living at the time in question in the same place as the husband.

I have not discussed the three decisions which were cited to us as they do not materially assist in the particular questions of construction raised by the present appeal, but I have read the judgment of Bucknill L.J. and completely agree with it. It is much more illuminating than my own. I think the wife was rightly assessed and charged, and the appeal must be allowed with costs here and below.

BUCKNILL L.J. (read by SOMERVELL L.J.): This is an appeal from the judgment of Macnaghten J., holding that the respondent was not personally liable to be assessed for income tax for the year 1942-43 in respect of a sum of 7,082*l.* received by her from abroad and to which she was entitled in her own right.

There is no dispute about the material facts. They are set out by the Special Commissioners in the case and stated more briefly by the learned judge in his judgment. The question for the decision of the court is whether on those facts, at the time when the wife was assessed and charged, the respondent was a married woman living in the United Kingdom separate from her husband within the meaning of proviso (2.) to r. 16. Macnaghten J., reversing the decision of the Special Commissioners, held that the respondent did not come within those words.

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The decision of the Special Commissioners was based on their opinion that proviso (2.) should be treated as a qualification of proviso (1.), i.e., as dealing with the particular case of a married couple who, although living together within proviso (1.), are temporarily in different places. Macnaghten J., on the other hand, came to the conclusion that if proviso (1.) is to be construed as covering a case such as the present one (which the Crown admitted was so) then "the second proviso must be read in its natural sense as applying only to the case where the spouses have separated in the ordinary sense of the word," to quote the precise words at the end of his judgment.

There is no authority bearing directly on the point. The opinions of the judges of the Court of Session in *Derry v. Commissioners of Inland Revenue* (1), were conflicting as to whether in the particular circumstances of that case the wife was living with her husband within the meaning of proviso (1.). The case therefore differs fundamentally from the present case inasmuch as in the present case the Crown has admitted that at the material time the respondent was living with her husband within the meaning of proviso (1.). "Wives living with their husbands" have been held to include all wives having a common matrimonial home with their husbands. The home need not be a house or even a room, and need not be at any fixed geographical point. Such wives include those whose husbands are absent from home, provided the absence is not due to a deliberate intention on the part of one or both spouses to break up the matrimonial home, or is not due to any decree or order of a competent court that the parties be no longer bound to cohabit with one another. In other words, "wives living with their husbands" fall into two classes, (a) husbands and wives in fact living together, and (b) husbands and wives who are for the time being living apart, not because they wish to do so, but by reason of the force of circumstances.

The question then arises, does the expression "wives living separate from their husbands" in proviso (2.) include wives in my suggested sub-class (b) of proviso (1.), or does it only include wives who are living separate from their husbands because of some judicial decree or order, or because of a deliberate intention on the part of one or both spouses to break up the matrimonial home? I think the question is a difficult one to answer, but there are two reasons which lead me to the conclusion that the Special Commissioners were right in their reading of the

rule. The first reason is that if proviso (2.) only includes wives living separate from their husbands because of some decree or order, or by mutual consent, or through desertion, then, inasmuch as such wives obviously do not come within proviso (1.), they fall within the general words of the rule. Consequently proviso (2.) would be unnecessary and in effect a mere partial repetition of the general words. On such a reading, to quote from the judgment of Lord Sands in *Derry's* case (1), "Proviso (2.) would be unnecessary and meaningless if regarded simply as a qualification of the provision of the opening clause 'as regards the wife's separate income.'" The second reason is that on such a limited reading of proviso (2.) the words "whether the husband be temporarily absent from her" would be almost impossible to apply to any case. "Temporary absence from her" does not seem to fit in at all with the idea of separation by decree or order, or by mutual consent, or by desertion.

Although judicial interpretation has given to the phrase "wives living with their husbands" a meaning which includes wives who are temporarily separated from their husbands by force of circumstances, no interpretation has been given to the phrase "wives separated from their husbands owing to his temporary absence from her" so as to limit it to wives separated by decree or order or mutual consent or desertion. In this connexion I may quote the phrase "separation allowance" used officially for payments made under certain circumstances to wives while their husbands are serving in the forces of the Crown, although still having a common matrimonial home. Thus art. 986 of the Royal Warrant for the Pay, etc., of the Army published in 1914 is as follows: "A soldier borne on the married establishment of his corps who, owing to service abroad, is separated from his wife and family shall contribute," etc.; and the side-note to s. 1, sub-s. 1, of the Army (Amendment) No. 2 Act, 1915, is "Provisions as to separation allowances." For these reasons I think that the decision of the Special Commissioners was right and that the appeal should be allowed.

SOMERVELL L.J. This appeal turns on the construction of r. 16 of the All Schedules Rules, dealing with the assessment of married women. I will not set out the rule or re-state the facts, as this has already been done. It was conceded by the Crown at the hearing before the Commissioners that on the facts as

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set out in the case the respondent was "living with her husband" within the meaning of proviso (1.), because although they were apart for a long period, the marriage, which was a happy one, subsisted. This concession is not, of course, binding on the court, but it is in accordance, I think, with the construction placed on these words by Rowlatt J. in *Eadie v. Commissioners of Inland Revenue* (1), and I will consider the arguments on the assumption that it is correct. On this basis the learned judge held that proviso (2.) should be construed as applying to cases outside proviso (1.), i.e., to cases where the spouses are not living together, but are separated by a decree of the court or by a deed or, I think, where, without any deed, each spouse has set up a separate home because there is no further desire for matrimonial relations and a common home. Mr. Grant supported this view, and I will consider his argument in more detail later. This view is supported by the general lay-out of the rule. The Solicitor-General contended that it was impossible to construe the words of proviso (2.) as limited to cases where the parties were separated in the sense that the marriage had broken down and there was no longer a common matrimonial home. He submitted that the phrase must be construed as a whole and the words "living . . . separate from her husband" construed in the light of the words following. The expression "temporarily absent from her" are apt to describe an absence such as that in question here and are unintelligible if Parliament intended to confine the proviso to wives legally separated from their husbands. The phrase "temporarily absent from her" suggests primarily the case where she remains at the matrimonial home and he is away on service or on official duties or business. These words compel the court to construe proviso (2.) in part at any rate as an exception to or cutting down of proviso (1.). He also relied on the final words of the proviso as supporting his construction. This, he said, was intended to cover a case where, for example, a husband overseas in the plantations sent remittances to his wife. The revenue authorities would be unable to collect the tax from him because of his absence. The remittance would escape effective tax unless the wife could be assessed. Though, no doubt, it is possible that a husband legally separated from his wife by an order of the ecclesiastical courts might make such remittances, the problem would arise far more frequently in cases where the marriage was fully subsisting.

(1) [1924] 2 K. B. 198.

If Mr. Grant's construction is right, this far more frequent case is left unprovided for, although Parliament clearly had the problem of such remittances escaping taxation in mind.

The only authority dealing with the construction of this proviso is the Scotch case of *Derry v. Commissioners of Inland Revenue* (1). In that case Lord Sands construed the section substantially in the way contended for by the Crown. He based this to some extent on the argument that the opening words and proviso (1.) are exhaustive. All cases not falling within proviso (1.) fall to be dealt with under the opening words and therefore the first part of proviso (2.) is unnecessary unless it is construed as covering cases within proviso (1.). Mr. Grant pointed out that this was not so when proviso (2.) was first introduced in the Act of 1805. At that time a married woman could only be assessed and charged in her own name on profits as a sole trader. Her income from sources here could be assessed on her trustees, but there were no means of assessing her on income from foreign possessions if she was not living with her husband. No doubt the court is entitled to look at the history of a statutory provision, particularly when it appears, as r. 16 does to-day, in a consolidation Act. On the other hand, the proviso with the words on which Lord Sands based his argument appears both in the Act of 1806 and in the Act of 1842. Lord Sands did not, I think, rely solely on this point, and in any case, as it seems to me, we have to construe the words as they now appear.

The Solicitor-General submitted quite rightly that it was sufficient for him to establish that the words covered this case. There was, however, a good deal of discussion on the words "or otherwise." They may bring in cases where there is a legal and permanent separation. It is in such cases unnecessary to provide for the wife being assessed in respect of remittances she was entitled to in her own right, but the later words under which she could be assessed as agent for her husband would be effective.

Mr. Grant's main argument may be summarized as follows. He relied, and rightly, on the form of the rule. He submitted further that living separate from her husband is the opposite of living with her husband. This is, he submitted, the condition precedent of proviso (2.). The following words may be inapt but cannot cut down this condition. He would read the rule somewhat as follows: A married woman living in the United

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Kingdom but not living with her husband in the sense of proviso (1.) can be assessed whether the husband is in the United Kingdom or not and whether the separation, as he construes that word in this proviso, is temporary or not.

The arguments on both sides were developed with force and clarity and my opinion fluctuated. If the words "living" "separate" had stood alone I should have accepted Mr. Grant's argument. I am, however, clear that one must construe the phrase as a whole. I have come to the conclusion that the words "whether temporarily absent from her or from the" "United Kingdom or otherwise" are inappropriate if the legislature had in mind legal separations and are on the whole appropriate to cover the facts of the present case. I also think there is substance in the Solicitor-General's argument based on the concluding words.

Other points were discussed. Mr. Stamp submitted that the rather curious words "from her or from the United Kingdom" were inserted after "absent," as, if they had not been there, it might not have been clear that absence from the wife although the husband was in the United Kingdom was to be covered. What is the necessary period of absence? I should myself have thought the year of assessment. This agrees with the Solicitor-General's submission. Mr. Stamp submitted that it was the previous year on the figures of which the assessment would be based. It is, I think, possible that the form of the rule, which, as I have said, dates back in essentials to 1806, may be due to the framers and re-enactors possibly wrongly construing the words "living with her husband" as meaning cohabitation in a common home. The form of the proviso certainly affords an argument for this construction, and I think it may have been the view of Lord Blackburn in *Derry's* case (1). I express no opinion on the point. Although the Solicitor-General submitted that the rule clearly covered the present case, he frankly admitted the difficulties and obscurities of the rule. It is unfortunate that a rule which has such a wide application should be left in this state. For the above reasons, I think the appeal should be allowed.

Appeal allowed.

Solicitor for the Crown : *Solicitor of Inland Revenue.*

Solicitors for the respondent : *Gordon, Dadds & Co.*

(1) 13 Tax. Cas. 30.

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ATTORNEY-GENERAL *v.* NORTHWOOD ELECTRIC
LIGHT AND POWER COMPANY, LIMITED.

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July 19, 22.

(Macnaghten J.)

Revenue—Stamp duty—Receipt for money—Entry on electricity prepayment meter card—Receipt not “given” to consumer—Stamp Act, 1891 (54 & 55 Vict., c. 39), s. 103, sch. I.

An entry made by a collector on an electricity prepayment meter card of the amount collected by him does not, where the card remains the property of the company supplying the electricity, constitute the “giving” of a receipt by the company so as to render the entry liable to stamp duty under the Stamp Act, 1891.

SPECIAL CASE STATED under R. S. C. Or. 68, r. 2 and Or. 34, r. 1.

In a suit commenced by subpoena, dated October 24, 1945, a claim was made by the Crown against the Northwood Electric Light and Power Company, Ltd., for payment of a fine of 10*l.* under the statutes relating to the revenue of stamps, it being alleged that the company had given a receipt liable to stamp duty which was not duly stamped.

The company carried on the business of supplying electricity, being the authorized undertakers for an area which included certain premises occupied by a Mr. Oliver at Eastgate, Middlesex. Mr. Oliver took a supply of electricity from the company and his consumption was measured by means of a prepayment meter. As in the case of other consumers using such meters, there was on the premises occupied by Mr. Oliver a meter card which was used throughout the period November 28, 1938, to March 8, 1943, notwithstanding any changes in the identity of the occupier of the premises. Another card covered the period March 8, 1943, to June 6, 1945. The card was normally kept hung on or near the meter. It was the practice for collectors employed by the company to call from time to time to inspect the meters and to deal with the money deposited therein. On such occasions the collector made entries on an electricity prepayment collection sheet and simultaneously, by means of carbon copying, on the prepayment meter card and on a blue card which was taken back by the collector to the company's offices for filing, but was brought back for further entries on the next visit by a collector. The prepayment meter card was the property of the company. Apart from the above duties the collector had no authority to give receipts on behalf of the company.

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Before signing an application for the supply to him of electricity, Mr. Oliver had been handed a copy of the company's Handbook and Conditions of Supply, cond. II of which provided as follows :

" II.—(1.) Every consumer taking a supply through a pre-payment meter shall pay to the company on demand any difference between the amount payable under the scale of charges under which he shall for the time being be chargeable for the number of units supplied to him and the amount of the coins in the box attached to the meter however such difference shall have arisen including (without prejudice to the generality of the foregoing) theft or loss of any coins placed in the box or any defect in the mechanism of the meter or otherwise.

" (2.) Coins on being placed in the box attached to the meter shall become the property of the company but the consumer shall be responsible for the safe custody thereof until collected by the company.

" (3.) If any disc or any coin not being legal tender shall at any time be found in the box attached to the meter the company shall be entitled forthwith to disconnect the premises and cut off the supply."

The card on Mr. Oliver's premises showed that on March 8, 1944, a sum of 3*l.* 1*s.* was taken from the meter, a rebate of 10*s.* 1*d.* was allowed to the consumer (in respect of payments made in excess of the charges payable under the scale of charges), a sum of 3*s.* was left in the meter and the balance of 2*l.* 7*s.* 11*d.* was taken away by the collector. The last-mentioned sum was entered on the card in a column headed " Amount due and collected."

It was contended on behalf of the Attorney-General that the entry on the prepayment meter card constituted a " receipt given for or upon the payment of money amounting to 2*l.* or upwards " under sch. I. to the Stamp Act, 1891 (1), and accordingly was liable to a twopenny stamp.

It was contended for the company (1.) that the consumer using a prepayment meter paid for his electricity in advance

(1) Stamp Act, 1891, sch. I., " receipt liable to duty and not which sets out a list of documents " duly stamped ; or (2.) In any liable to stamp duty, includes : " case where a receipt would be " Receipt given for, or upon the " liable to duty refuses to give a " payment of, money amounting " receipt duly stamped . . . he " to 2*l.* or upwards." Section 103 : " shall incur a fine of 10*l.*"
" If any person—(1.) Gives a

never owed any money to the company except when there was a "difference"; (2.) that the entry in question recorded only the removal by the company of money which had belonged to the company and not any payment of a debt due to the company (3.) that such entry was not a "receipt" within the meaning of the material provisions of the Stamp Act, 1891; and (4.) that the entry was not "given" within the meaning of those provisions.

Sir Frank Soskice S.-G. and J. H. Stamp for the Crown.

Sir Roland Burrows K.C. and Colin Pearson for the company.

MACNAGHTEN J. The case for the Crown is that the prepayment meter card, after the entries have been made on it by the collector on the occasion of his visit, is a "receipt" within the meaning of s. 101 of the Stamp Act, 1891, and reliance is placed on the entries in the column headed "Amount due and collected." The words "amount due" plainly mean the amount due from the consumer to the company for the electricity which the consumer has used, and the word "collected" must, I think, mean that the collector has collected and taken away the amount set out in that column. The fact that the entries so made by the collector bear his initials necessarily means, I think, that the collector has received the amount in that column and that he has received it on behalf of the company. Accordingly it is claimed by the Crown that this card, being a "receipt" within the meaning of the Act and being for an amount of more than 2*l.*, ought to be stamped in accordance with the Act.

To that claim the answer is made that the card is no more than a duplicate of the entry on the electricity prepayment collection sheet and that that is merely a memorandum made by the collector on behalf of the company for the purposes of the company. I do not think that that is an effective answer. It is true that the collection sheet remains in the possession of the collector throughout, but the card was on Mr. Oliver's premises when the collector arrived and remained on the premises after he had gone away. Therefore, if the company gave the card to Mr. Oliver, the requirements of s. 103 of the Act would seem to be fulfilled. But was the card given to Mr. Oliver? It was no doubt in his possession or care so long as it remained on his premises, but the case states that the card remained throughout the property of the defendant company. The company were entitled to take the card away if they

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pleased. Mr. Oliver might perhaps have been entitled to ask the company to replace it with another card, but he had no right to retain it. In my opinion, the word "gives" in para. (1.) of s. 103, means what it says, that the person to whom the receipt is given can keep it as his own. That view is borne out by the words of para. (2.) of that section, which provides that any person who refuses to give a receipt duly stamped incurs a fine of 10*l*. That cannot, I think, be held to mean that if a person hands to the person demanding a receipt an unstamped document and does not allow him to keep it, he, by doing so, discharges his obligation to give a receipt. The question submitted for the opinion of the court is whether, on the facts stated in the special case, the company has given a receipt liable to duty and not duly stamped. My answer to that question is that the company did not give to Mr. Oliver any receipt liable to duty and not duly stamped. There will therefore be judgment for the company.

Solicitor for the Crown : *Solicitor of Inland Revenue.*

Solicitors for the Company : *Sydney Morse & Co.*

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Aug. 8, 9.

Sellers J.

ELLEN POPE *v.* ST. HELEN'S THEATRE, LIMITED.

Personal injuries—Fall of theatre ceiling—Negligence—Breach of duty or warranty—Impact of bomb dropped five years previously on neighbourhood—Cause of plaintiff's injuries—War injury—Personal Injuries (Emergency Provisions) Act, 1939 (2 & 3 Geo. 6, c. 82), ss. 3, 8.

The plaintiff, while one of the audience attending a performance in the defendants' theatre, was injured by the fall of part of the ceiling, and she claimed damages from the defendants, alleging negligence and breach of warranty or duty. The defendants, while denying negligence or breach of warranty or duty, contended that the fall of the ceiling was a consequence of the blast of a bomb or bombs dropped on property in the vicinity of the theatre some five years before, during an air raid, that the plaintiff's injuries were therefore "war injuries" within the meaning of s. 8 of the *Personal Injuries (Emergency Provisions) Act, 1939*, and that her claim was barred by s. 3, sub-s. 1 of that Act :—

Held, that although the damage to the roof of the theatre was a result of the explosion of a bomb, the plaintiff's injuries were caused by the neglect of the defendants' to make periodical examinations, which would have revealed the progressive deterioration of the structure. Therefore the plaintiff's injuries were not war injuries and her claim was not barred by s. 3, sub-s. 1, of the Act.

ACTION tried before Sellers J. at Liverpool Assizes and adjourned to the High Court for argument.

On July 4, 1945, the plaintiff, Mrs. Ellen Pope, was one of an audience which had attended the defendants' cinema, the Theatre Royal, St. Helen's. She was seated in the stalls, and soon after six o'clock, when the performance was commencing, part of the ceiling fell on her and other persons seated beneath. Some fifteen people were injured, two of them fatally. The plaintiff suffered injuries, and her damages were agreed at 75*l*. The present action was brought as a test case to establish whether the defendants were liable for the injuries so caused, or whether the injuries were "war injuries" and therefore the claim was barred by s. 3, sub-s. 1 of the Personal Injuries (Emergency Provisions) Act, 1939 (1).

The plaintiff by her pleadings alleged that the fall of the roof or ceiling was in breach of the defendants' warranty, implied from the admission of the plaintiff to the theatre for reward, that the theatre should be as safe as it could be made by reasonable care and skill; alternatively, that the defendants knew, or ought to have known, of the dangerous condition of the roof, and in breach of their duty failed properly or regularly to inspect, alter, repair or maintain the same.

The defendants denied negligence or lack of care or skill and pleaded that in consequence of the blast and suction arising from the exploding of a bomb or bombs dropped in close proximity to the theatre during an enemy air raid in September, 1940, the structure of the theatre was subjected to abnormal

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(1) Personal Injuries (Emergency Provisions) Act, 1939, Section 3, sub-s. 1: "In respect of a war injury sustained during the period of the present emergency by any person . . . no such compensation or damages shall be payable, whether to the person injured or to any other person, as apart from the provisions of this subsection—(a) would be payable under the Workmen's Compensation Acts, 1925 to 1938, or the Employers' Liability Act, 1880 . . . or (b) would, whether by virtue of any enactment, by virtue of any contract, or at common law, be payable . . .

"on the ground that the injury in question was attributable to some negligence, nuisance or breach of duty for which the person by whom the compensation or damages would be payable is responsible."

Section 8: "'war injuries' means physical injuries—(a) caused by—(i.) the discharge of any missile . . . or (ii.) the use of any weapon, explosive or other noxious thing; or . . . (b) caused by the impact on any person or property of any enemy aircraft . . . or any part of, or anything dropped from, any such aircraft."

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strains, with resulting fracturing and deterioration, which could not have been discovered by reasonable care and skill, and which became manifest only after the ceiling had fallen. They further alleged that the injuries to the plaintiff amounted to a "war injury" within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, and that therefore the claim of the plaintiff was barred by s. 3, sub-s. 1 of that Act.

The theatre was built in 1901 and it was found by the learned judge that the construction and design of the roof and ceiling were adequate. In September, 1940, a bomb was dropped by enemy aircraft some one hundred and fifty yards from the north-west corner of the theatre and in January, 1941, when some decorations were being done to the ceiling, it was observed that that part of the ceiling which subsequently fell was displaced, and some plasterers were called in to put it right. The plasterers did all that was in the circumstances possible to repair the ceiling and left it in a satisfactory condition for the time being: but the damage done to the ceiling was such that the ceiling became progressively insecure and had there been periodic examination of the ceiling after the discovery of the damage in 1941 the deterioration of the ceiling would have been discovered. No examination, however, of the ceiling was ever made by the defendants and the learned judge held that in failing to take the precaution of examining the ceiling from time to time the defendants had acted negligently, and apart from the point raised of the effect of the Personal Injuries (Emergency Provisions) Act, 1939, the plaintiff was entitled to succeed in accordance with the principle laid down by McCardie J. in *Maclean v. Segar* (1).

Pritchard K.C. and *Baucher* for defendants. This was a war injury, caused by the discharge of a missile by the enemy, or by the impact on property of something dropped from an enemy aircraft. We rely on the definition of war injuries in both (a) and (b) of s. 8. "The proximate cause [of an injury] is not necessarily the one which operates last, but is the effective and predominant cause, selected from among co-operating causes. This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common sense standards." (See headnote, *Yorkshire Dale Steamship Co. v. Ministry of War Transport* (2). "The adverb 'proximately' does not greatly assist the solution of

(1) [1917] 2 K. B. 325, 332.

(2) [1942] A. C. 691, 702, 706.

“ the problem, but it at least serves to emphasize that it is
 “ the predominant and determining cause that has to be
 “ sought No formula can be devised which will
 “ provide a universal touchstone for the infinite variety
 “ of circumstances which may arise. Each case must be
 “ judged in the light of its own facts and by resorting, not
 “ to the refinements of the philosophical doctrine of causation,
 “ but to the commonplace tests which the ordinary business
 “ man conversant with such matters would adopt ” (per
 Lord Macmillan in *Yorkshire Dale Steamship Co. v. Ministry of
 War Transport* (1)). (See also per Lord Wright.)

[Sellers J. Is there not a break in the chain of causation if
 there is a finding that there has been an intervening act which
 is a negligent act ?]

The Act of 1939 clearly contemplates that if the effective
 cause was war damage the fact that there was a subsequent act
 of negligence does not matter. In *Taylor v. Sims and Sims* (2)
 Lewis J. interpreted s. 3 of the Act of 1939 as meaning that
 where a plaintiff suffered a war injury he could not recover from
 another person on the ground that the injury was attributable
 to that person's negligence. The learned judge also held that
 the blast of a bomb was “ impact.” The Act of 1939 gave
 rights to citizens but laid it down that the remedy should be
 only in a certain way, viz., under the scheme prepared by the
 Minister, with the approval of the Treasury, as empowered by
 s. 1 (see St. R. & O. 1944, No. 369). In *Leanse v. Egerton*
 (Lord) (3), the plaintiff recovered judgment because the
 defendant had not taken reasonable steps to abate a nuisance
 caused by an air raid, but there the Act of 1939 was not
 mentioned at all. The primary object of that Act is to give
 rights and at the same time to take rights away. Section 3
 takes away the right to sue for negligence. Applying the rule
 laid down in *Yorkshire Dale Steamship Co. v. Ministry of War
 Transport* (4) it is submitted that this plaintiff has suffered
 a war injury and that even if that injury was assisted by negli-
 gence, whether before, at the time, or afterwards, the defendants
 are protected by s. 3. [*Greenfield v. London & North Eastern
 Ry. Co.* (5); *Adams v. Naylor* (6); *Smith v. Davey Paxman
 & Co. (Colchester), Ltd.* (7); also referred to.]

(1) [1942] A. C. 691, 702, 706.

(2) [1942] 2 All E. R. 375.

(3) [1943] K. B. 323.

(4) [1942] A. C. 691.

(5) [1945] K. B. 89.

(6) [1946] A. C. 543.

(7) [1943] 1 All E. R. 286.

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Wooll K.C. and G. N. England for plaintiff. The meaning of the word "cause" in the definition of "war injuries" is a vital matter which the court has to construe. There must be proof of causation within the ambit of (a) or (b) of s. 8, and it is submitted that this accident to the plaintiff was not so caused, but was caused by the negligence of the defendants. It is a curious feature of the case that from first to last the court has not been assisted by any evidence from anybody associated with the theatre as to any care having been taken in regard to the maintenance, repair, or general supervision of the property. That really disposes of the case. The court is bound by the decision in *Smith v. Davey Paxman & Co. (Colchester), Ltd.* (1). *Adams v. Naylor* (2) has no bearing on this case. There the cause was the explosion of the mine and the sole question was whether the minefield was laid "in combating the enemy." The actual impact of the boy's foot with the mine caused the boy's death, irrespective of its being due to negligence. The controversy was not over the words "cause" or "causation"; but the present plaintiff relies on the observations of MacKinnon L.J. and Morton J. In this case the issue under the Act of 1939 is entirely different, viz., was the accident caused by the discharge of any missile or the use of any weapon or explosive, or by the impact of anything dropped from an aircraft? It was caused, it is submitted, by the failure of the defendants to inspect the roof and ceiling periodically, in accordance with the warnings they had received, and inviting persons into premises which they had not taken care to see were not dangerous. The sole question is what caused the accident, and the intervening negligence should be held to be the cause. The consequences of the impact of the bomb were the cause of the ceiling falling and not the impact itself. Section 3 purports to bar claims made on the ground that the injury "was attributable to some negligence, "nuisance or breach of duty." Breach of duty there is a purely tortious breach of duty, and not a breach of a contractual obligation. Here the defendants' obligation was contractual. It was a warranty implied from the contract under which the plaintiff entered the theatre and it is impossible to see how the plaintiff's rights under that implied warranty can be taken away by that paragraph of s. 3.

[They relied on *Greenfield v. London & North Eastern Ry. Co.* (3); and also referred to *Cushing v. Peter Walker & Son* (4).]

(1) (1943) 1 All E. R. 286.

(3) [1945] K. B. 89.

(2) [1944] K. B. 750, on app.
(H. L.) [1946] A. C. 543.

(4) [1941] 2 All E. R. 693.

Pritchard K.C. in reply. An intervening act may break the chain of causation, but an omission to do something cannot. As to the meaning of the word "impact" in s. 8, it is to be noted that the clause refers to impact on "any" property, and it is admitted that a bomb fell on houses in the vicinity of the theatre. *Greenfield v. London & North Eastern Ry. Co.* (1) is to be distinguished. There was in that case an intervening act.

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SELLERS J. : In this case, after the very full arguments on both sides, for which I am indebted, I have formed the opinion that the plaintiff is entitled to succeed. [His Lordship stated the facts and having read the pleadings and elaborately reviewed the evidence continued :] This action has been brought to establish whether the defendants are to be held responsible for the injuries caused by reason of this unfortunate occurrence.

When the plaintiff alleges that the fall of the ceiling was due to a breach of warranty, or a breach of duty, by the defendants, I have formed the view that that allegation is established—that the defendants have failed to take reasonable care, by themselves or their agents, to maintain these premises; and that they have failed, during all that period from 1941 to 1945, to have proper inspection, or to have any inspection, in the light of the circumstances which preceded that fall. They had known of the defective condition of the ceiling, brought about, as I think it must inevitably be inferred, by the explosion of a bomb in 1940, and they had left the ceiling unattended during the whole of that period. Therefore, if this were a case standing without the plea which the defendants raise, of the Personal Injuries (Emergency Provisions) Act, 1939, I should be prepared at this stage to give judgment for the plaintiff for the amount which has been agreed. It seems to me that this is an ordinary case of theatre proprietors inviting people to their theatre for reward, where they have failed in their duty to see that such theatre is suitable and safe for the purposes of performances and invitation of the plaintiff there.

The defendants however do raise the Act, and they say it is a bar to the plaintiff's claim, notwithstanding a finding, as I understand it, that there has been established by the facts, apart from the provisions of the Act, a liability to compensate the plaintiff. It is necessary, therefore, for me to consider that allegation and the provisions of the Act. The preamble of the Personal Injuries (Emergency Provisions) Act, 1939, says that

(1) [1945] K. B. 89.

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it is "an Act to make provision as respects certain personal injuries sustained during the period of the present emergency." Section 1 of the Act reads as follows: "The Minister may make a scheme, with the approval of the Treasury and in accordance with the provisions of this Act, providing for the making of payments in respect of the following injuries sustained during the period of the present emergency, namely, (a) war injuries sustained by gainfully occupied persons . . ." It is common ground that a scheme has been made and was in operation at the time of the plaintiff's injuries, and that the plaintiff was at that time a gainfully occupied person.

The section relied upon by the defendants is s. 3, headed: "Relief from liability to pay compensation or damages." [His Lordship read the material parts of ss. 3 and 8 and continued:] It is said on behalf of the defendants that the physical injuries received by the plaintiff were war injuries, and being war injuries s. 3 applies, and no compensation or damages shall be payable, notwithstanding—I think this is the effect of it—any decision that the injury in question was attributable to some negligence or breach of duty on the part of the defendants. Recently, in the House of Lords, in the case of *Adams v. Naylor* (1), Viscount Simon, in his speech, has made some general observations with regard to this Act, and he says: "Its long title is: 'An Act to make provision as respects certain personal injuries sustained during the period of the present emergency' and its primary object was to authorize the making of a scheme by which payments might be made out of public funds in respect of war injuries sustained by defined classes of persons. Some such arrangement was obviously called for, since otherwise victims of German air raids (to take one example) would, generally speaking, have no claim for any payment or compensation. The statute provided, by s. 1 (1.) (a) that the war injuries which would attract payment under the scheme should be such as were sustained by gainfully-occupied persons (with such exceptions, if any, as may be specified in the scheme) and by persons of such other classes as may be so specified"; and then he deals with the scheme as it was then applicable.

The statute was enacted for the purpose of giving rights which would not otherwise be available, and the question now arises in this case whether it can be said that the statute operates as a

bar where, apart from the provisions of the Act, I would, as I have already indicated, be prepared to find that there was a liability in the defendants. I am taken back in consideration of this matter—or taken at once—to the definition of a war injury. “War injuries” means physical injuries, and that means, applied to this case, the physical injuries of the plaintiff. Were the physical injuries of the plaintiff “caused by the discharge of any missile . . . or the use of any weapon, explosive or other noxious thing ; or”—and this is relied upon by Mr. Pritchard, for the defendants, more particularly—“caused by the impact on any person or property of” anything dropped from an aircraft? The findings which I have already made are to the effect that the damage to the ceiling supports—that is, the damage to the property or building—was caused by the explosion of the bomb, and I think it may well be said that the bomb which there discharged and exploded was something which dropped—although there is no direct evidence of this, I think I can infer it—from an aircraft. In those days I do not think anybody suggested that they came from anywhere else, although nobody has given any evidence about it. Mr. Wooll, in dealing with this definition of “war injuries,” has contended, as far as (b) is concerned, that although it may have been a bomb dropped from an aircraft which fell in the vicinity of Charles Street, a hundred and fifty yards away, the damage to the ceiling in the Theatre Royal was not caused by the impact of anything dropped from such aircraft; he says it was the blast, on that view of the fact, which caused the damage, and not the impact of anything dropped. Mr. Pritchard says that that cannot be the effect of this definition of “war injuries”; that it was the impact of the bomb, which on impact did explode, which destroyed two houses, in Charles Street, and which did other damage to surrounding property, including the damage to the Theatre Royal, St. Helen’s. I am inclined to think that that is the more appropriate view to take, and that it was the impact of the bomb which caused this damage to the supports of the ceiling. At any rate I think the damage to the ceiling was caused by the discharge of a “missile” under (a) (i.) or by the use of an “explosive” by the enemy under (a) (ii.), I think that is the effect of it.

That was the cause of the damage to the building, but that is not sufficient to make this a war injury; I have to consider what caused the physical injuries to the plaintiff. I have found already that the physical injuries to the plaintiff were caused

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by a breach of duty by the defendants as occupiers and undertakers of The St. Helen's Theatre, Ltd.—a breach of duty in failing to take reasonable steps to have their premises reasonably safe for the purpose of people attending there, and I do not find it possible, concurrently with that finding, to say that here the injuries were caused by the bomb which fell in September, 1940. Therefore, I do not find that there has been here, in respect of this plaintiff, a "war injury." Mr. Pritchard pressed me to say that the war damage—the impact; one puts it in that way—or the explosion which caused the damage to the ceiling, or more particularly to the wads which held the ceiling, continued to operate month after month through the years, and that when the ceiling fell it was the cause, following the blast damage to the building, of the physical injury to the plaintiff. I have considered that submission, but I do not find myself able to accept it. I think the physical injuries here to the plaintiff were not so caused, but are properly to be held to have been caused by the breach of duty by, and negligence of, the defendants.

Reliance was placed by Mr. Pritchard not only on the definition of "war injuries" but also on such assistance as can be obtained from s. 3 of the Personal Injuries (Emergency Provisions) Act, 1939, which does seem to contemplate cases where there may be war injuries—that is, there may be physical injuries—caused by an explosion or impact under the definition, and at the same time it may be held that the physical injuries were caused in such circumstances that they could be "attributable to some negligence, nuisance or breach of duty" "for which the person by whom the compensation or damages" "would be payable is responsible." There may be cases of that sort. There may be cases where such a finding is possible and in such a case the Act would appear to relieve a defendant from liability to pay damages. Some negligence prior to or some negligence concurrent with or possibly, although I find it hard to visualize a satisfactory illustration, some negligence after, for example, a bomb explosion may justify a finding that the negligence and the bomb explosion were the first cause of a plaintiff's injuries. Here I find the negligence alone was the effective cause or the operating cause of the damage claimed. Therefore I have come to the conclusion that the Personal Injuries (Emergency Provisions) Act, 1939, does not give relief to the defendant in the way that is claimed by Mr. Pritchard. Several authorities have been referred to.

Adams v. Naylor (1), to which I have referred, seems to turn on another point, which does not arise here—that of combating the enemy. *Greenfield v. London & North Eastern Ry. Co.* (2) is perhaps of the greatest assistance. It is the case where a bomb dropped from an enemy aircraft at 9.10 one evening had made a crater on the railway line. The headnote continues : “ At 9.45 p.m. the engine of a train overturned in the crater and “ the engine-driver, who was ‘ proceeding at caution ’ on a “ direct order (admittedly negligent) from his employers, “ was killed,” and it was held “ that the injury to the engine- “ driver was not ‘ caused by the impact on property ’ of an “ enemy bomb, and therefore, was not a ‘ war injury ’ within “ the meaning of s. 8, sub-s. 1, of the Personal Injuries (Emer- “ gency Provisions) Act, 1939.” MacKinnon L.J., in that case, on p. 92, says this : “ It is true that the hole into which the “ engine fell was caused by a bomb from an enemy aeroplane, “ and that Greenfield’s injury was caused by his engine falling “ into the hole, but I cannot think that his injury was caused “ by the impact of the bomb on the defendants’ railway line. “ If, while his engine was on its way, a German bomb had “ fallen on or close to it, and Greenfield had been killed by the “ explosion, he would clearly have suffered a war injury “ under para. (a) of the sub-section (3).” No such contention could, of course, be made here, that there was any physical injury caused to the plaintiff by the explosion in the way that MacKinnon L.J. interprets it there. The judgment goes on : “ If, while the engine was proceeding, a German bomb had “ fallen on a bridge and shattered it, so that parts of the bridge “ fell on Greenfield and injured him, then, I think, he would “ have, under para. (b) of the sub-section, suffered an injury “ caused by the impact on . . . property ’ of something “ dropped from an enemy aircraft. In my view, the addition “ in para. (b) of the words ‘ impact on any property ’ to the “ words ‘ impact on any person ’ is to cover the case of a bomb “ which does not hit a person, but hits something near him (for “ example, a house) which thing, or parts of which thing, in “ their fall or dissolution, injure the person.” The learned Lord Justice does not in terms say so, but it would appear from that that he was not dealing with a case where there was any great length of time between the hitting and the injury to the person ; other factors must inevitably arise then, as they do in

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(1) [1944] K. B. 750 ; [1946] (2) [1945] K. B. 89.
A. C. 543. (3) Ibid. 92.

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this case, where there is added deterioration of the condition, and also opportunity to inspect and repair.

Before I leave MacKinnon L.J.'s judgment I might add the few words which appear later, towards the end of it. He says there : " The only question in the present case is : What is the meaning of the apparently simple words ' physical injuries ' ' caused by ' certain acts ? So far as those cases do assist me, I think they support my conclusion that the injury to Greenfield was not *caused* by the impact on him, or on any property, of anything dropped from an enemy aircraft." Lawrence L.J. says this : " We have, however, not to consider the subject of legal causes in general, but the particular words of s. 8, sub-s. 1. Those words all relate to acts which are not continuing, but immediate—' the discharge of any missile ' ' the use of any weapon,' ' in combating the enemy or in ' repelling an imagined attack by the enemy,' ' the impact ' . . . of anything dropped from any such aircraft.' Such acts may be contemporaneous with acts of negligence and, jointly with those acts of negligence, may cause injuries, but where, as here, the impact of the bomb qua impact, is over and done with, the impact cannot truly be said to cause injury. It is the crater, not the impact of the bomb, which directly causes the injury. It may be that the crater will cause an injury years after the impact " (1).

Cassels J. expresses a view which does not seem to be dealt with by the other two learned members of the court. He says : " Though in the history of the events leading up to the accident there may be an enemy act, some negligence independent of the enemy act may be the effective cause. The facts of one case do not always assist in determining the legal effect of the facts in another case, and I am not sure that illustrations serve a very useful purpose, but, if the negligent driver of a motor car, by high speed and failure to keep a proper look-out, overturns his vehicle into a hole, which he might, by the exercise of reasonable care, have avoided, and this injures his passenger, to whom he owes a duty to take care, I should find it difficult to believe that the effective cause of the passenger's injuries was enemy action which had made the hole some time before the accident, and not the ' negligent driving ' " (2).

That case, subject to various distinctions which have been indicated before me, does I think support me in the view I have

(1) [1945] K. B. 93.

(2) Ibid. 95.

taken here, and I find it, on these facts, not possible to say that the physical injuries to the plaintiff were caused by the enemy action on September 5-6, 1940. In those circumstances, the damages having been agreed at 75*l.*, I give judgment for the plaintiff for that sum, with costs.

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Solicitor for plaintiff : *F. H. Henri, Liverpool.*

Solicitor for defendants : *Oppenheim, Son & Ross, Liverpool.*

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Habeas corpus — Alien enemy — Internment — Application for writ — Surrender of Germany — Status as State — Continuing state of war.

Scott,
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Asquith L.JJ.

By virtue of the Royal Prerogative, the Crown, acting through the Executive, has the right to intern, expel, or otherwise to control an alien enemy according to its discretion. That right cannot be questioned or controlled in or by the King's Courts. The court, therefore, will not entertain an application for a writ of habeas corpus at the instance of an alien enemy interned by order of the Executive.

By English law the King alone can make peace with a State with which this country has been at war and thereby bring the state of war to an end, and a certificate of His Majesty's Secretary of State for Foreign Affairs to the effect that His Majesty is still at war with that State is conclusive evidence that the state of war is not at an end, even though it recites facts—such as the unconditional surrender of the enemy State, the displacement of its central government and the assumption of supreme authority with respect to that State by the governments of His Majesty and his Allies—which might be regarded in international law as putting an end to the state of war.

R. v. Vine Street Police Station Superintendent; Ex parte Liebmann [1916] 1 K. B. 268 approved.

Ex parte Weber [1916] 1 K. B. 280 (n); [1916] 1 A. C. 421 considered.

Decision of Divisional Court affirmed.

APPEAL from a decision of the Divisional Court.

An application was made to the Divisional Court for a writ of habeas corpus by Carl Walter Kuechenmeister, a German national, to be directed to the respondent, Lt.-Col. Edward

Reported by R. C. CALBURN, Esq., Barrister-at-Law.

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Richard Bottrill, Commandant of the Internment Camp at Beltane School, Wimbledon. In an affidavit, the applicant stated as follows : He came to England in 1928 and was granted the right of permanent residence in 1931. He then married an Englishwoman, by whom he had three children, all born in England. In May, 1939, he applied for British nationality. In August of that year he was asked by the Home Secretary to leave the country. He thereupon went to Eire, where he remained until December, 1939, when he was informed by the Home Office that he might return to England to appear before an advisory committee on the question of his internment. He did so, and was sent to Australia for internment. He remained there until 1945, when he returned to England, being sent to the internment camp at Beltane School on his arrival.

At the hearing of the application before the Divisional Court, the Attorney General produced a certificate dated April 2, 1946, from Mr. Bevin, Secretary of State for Foreign Affairs, which stated as follows : “ (1.) That under para. 5 of the “ preamble to the declaration, dated June 5, 1945, of the “ unconditional surrender of Germany, the Governments of the “ United Kingdom, the United States of America, the Union of “ Socialist Soviet Republics, and France assumed ‘ supreme “ ‘ authority with respect to Germany, including all the powers “ ‘ possessed by the German Government, the High Command, “ ‘ and any State, municipal or local government or authority. “ ‘ The assumption, for the purposes stated above, of the said “ ‘ authority and powers does not effect the annexation of “ ‘ Germany.’ (2.) That in consequence of this declaration, “ Germany still exists as a State and German nationality as a “ nationality, but the Allied Control Commission are the agency “ through which the government of Germany is carried on. “ (3.) No treaty of peace or declaration by the Allied Powers “ having been made terminating the state of war with Germany, “ His Majesty is still in a state of war with Germany, although, “ as provided in the declaration of surrender, all active hostilities “ have ceased.”

The Divisional Court held that that certificate was conclusive as to the matters which it purported to certify ; that the applicant accordingly remained an alien enemy notwithstanding the unconditional surrender of Germany ; and that, as an alien enemy interned in this country, he could not apply to the court for a writ of habeas corpus.

The applicant appealed.

John Foster for the applicant. The Divisional Court was wrong in holding that the certificate given by the Secretary of State for Foreign Affairs was conclusive of the fact that a state of war between this country and Germany was still in existence so that the applicant was an alien enemy. The proper question which should have been addressed to the Secretary of State was whether the territory formerly included in Germany and now occupied by the four United Nations constitutes an independent sovereign State, and, if so, whether, in view of the declaration of unconditional surrender made by Germany (see Command Paper 6648 of 1945), His Majesty's Government is at war with that State.

When the surrender was made and the Allies took charge of Germany, there ceased to be any government in Germany except that of the Allied Control Commission. War cannot exist between two countries unless each of them has its own government. In an Article in the American Journal of International Law (vol. 39, p. 518) the position was put in this way by Professor Kelsen: "Since her unconditional surrender Germany "has ceased to exist in the sense of international law. Having "ceased to exist as a State, the status of war has terminated "because such a status can only exist between belligerent "States." A State cannot be at war unless its government is at war. If, therefore, his Majesty is not at war with the present State of Germany, it follows that the citizens of that state cannot be enemy aliens. [On this point *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Batham Steamship Co., Ltd.* (1), *Government of the Republic of Spain v. SS. Arantzazu Mendi* (2), and *Grotius Society*, vol. 29, p. 143 were referred to.]

It is next said that the applicant is an alien enemy prisoner of war and that, as such, he cannot apply for a writ of habeas corpus. It is submitted, however, (1.) that an alien enemy, so long as he is not a prisoner of war and so long as he remains under the protection of the Crown, can apply for a writ of habeas corpus; (2.) that alien enemies who are prisoners of war can sue or be sued but cannot apply for a writ of habeas corpus; (3.) that alien enemies who are within the protection of the Crown and are then interned do not become prisoners of war by reason only of that internment. Admittedly that last proposition is contrary to the decision in *Ex parte Liebmann* (3) where it was held that a civilian alien enemy became a prisoner

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(1) [1939] 2 K. B. 544, 553.

(3) [1916] 1 K. B. 268.

(2) [1939] A. C. 256.

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of war on his internment, but that decision was based on the fact that the war was (1915) still in progress, so that a civilian in this country was in a position to render assistance to the enemy. When once actual hostilities have ceased, the ratio decidendi of that case no longer applies. It is in any event open to the Court of Appeal to say that it was wrongly decided. There is no rule of law that an enemy alien who is not a prisoner of war, but whose licence to be at large here has been terminated, is not entitled to a writ of habeas corpus, and a fortiori there is no rule of law which says that an alien enemy, as such, is not entitled to a writ.

In *Schaffenius v. Goldberg* (1) it was held that internment of a registered alien enemy does not operate as a revocation of the licence to remain in this country which is implied in registration. In *Ex parte Liebmann* (2) the Divisional Court had said—whatever the reasons for its decision—that alien enemies when interned were deprived of the right to sue for a writ of habeas corpus. It is submitted that the Divisional Court was wrong. Alien enemies who are prisoners of war are the only exception, for they have not that right.

[Scott L.J. Is not the King's licence a permission to an alien enemy to remain in this country in freedom? Internment would seem almost necessarily to involve the revocation of the licence.]

The decision in *Schaffenius v. Goldberg* (1) would seem to determine that it does not: see per Bankes L.J. (3), and per Warrington L.J. (4). *Ex parte Liebmann* (2) is distinguishable from the present case because, active hostilities having ceased, civilian internees are no longer prisoners of war. *Ex parte Weber* (5) should not be treated as an authority for the proposition that an alien enemy if interned is incapable of suing for a writ of habeas corpus, because the only argument in that case which would get Weber out of prison was to show that he was not a German national. Therefore his advisers were not concerned to show that he was not a prisoner of war, and argument was not addressed to that point. This court may think that *Ex parte Liebmann* (2) was wrongly decided. In that event, the only authority for holding that an interned alien enemy cannot sue for a writ of habeas corpus would disappear. In both *Rex v. Commandant of Knockaloe Camp* (6) and *Ex parte L.* (7), the court held itself bound to follow the

(1) [1916] 1 K. B. 284.

(2) [1916] 1 K. B. 268.

(3) [1916] 1 K. B. 303.

(4) Ibid. 304.

(5) [1916] 1 K. B. 280 (n).

(6) [1917] 117 L. T. 627.

(7) [1945] K. B. 7.

decision in *Ex parte Liebmann* (1). The Crown has taken the point that internment under the Royal Prerogative turns a person into an alien enemy. Therefore unless *Ex parte Liebmann* (1) is overruled it is impossible to test whether the Crown has power to intern a friendly alien enemy under the Prerogative.

[*Rex v. Home Secretary ; ex parte Duke of Chateau Thierry* (2) referred to.]

Sir Hartley Shawcross A.-G., and *H. L. Parker* for the Crown. This case is, having regard to the way it has progressed, an exceedingly important one, and perhaps of greater practical importance to the Crown than to the applicant. It has been sought on behalf of the applicant to draw a distinction between civilians and combatants, but both are detained under an act of state. The proposition advanced for the applicant is that if, during a war, the enemy government suddenly comes to an end, its members committing suicide or otherwise disappearing, then, although fighting and resistance may still be continuing, despite the absence of central organization, there would no longer be any war, because there was no longer any State with which His Majesty could be at war. That argument, if accepted might result in His Majesty's saying that he was "still at war" and the court's saying that he could not be. The basis of the argument for the applicant is that the government of Germany has ceased to exist; therefore Germany no longer exists and there is no State with which to be at war. That raises the question whether a State continues to exist if its government disappears. There has been a great deal of academic discussion on that point, with many definitions of a State. It is not desired to argue that question under international law, though the Crown is quite prepared to fortify its submission by reference to international law. The position is that this country is now in belligerent occupation of Germany, with the army of occupation in control. The government of Germany is still in suspense. The real question here is how His Majesty treats the present relationship with Germany. The final decision of peace or war rests with the supreme power: see *McNair, Legal Effects of War* (2nd ed., pp. 2-6). His Majesty's declaration of Germany's unconditional surrender was merely a declaration as to the manner in which the government of Germany, without annexation, would be carried on. That declaration is followed by the certificate of the Foreign

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(1) [1916] 1 K. B. 268.

(2) [1917] 1 K. B. 922.

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Secretary, the last paragraph of which is unequivocal. His Majesty states that he considers himself to be at war with Germany, and it is for the court not to canvass that statement but to accept it whatever the effect of the unconditional surrender may be. It is a statement of fact, and its correctness cannot be challenged on any ground of law. In effect the certificate says that His Majesty has through his military commanders secured the unconditional surrender of Germany and established a form of military government there, but that he is nevertheless still at war with Germany.

H. L. Parker following. The certificate given by the Foreign Secretary being clear and unambiguous, the court is bound by the view expressed in it. The first authority for that proposition is *Duff Development Co., Ltd. v. Kelantan Government* (1), where His Majesty's view on the question whether Kelantan was a sovereign independent State was given in the form of a letter with a copy of a treaty attached. [The speeches of Lord Cave (2), Viscount Finlay (3), Lord Sumner (4) and Lord Carson (5) referred to.]

While, no doubt, interesting questions of international law may arise as to the effect of the Foreign Secretary's certificate, His Majesty is entitled to declare that, whatever the state of the international law on the subject, his view is that there is still a State of Germany and that he is in a state of war with that State. [Judgment of Lord Esher in *Mighell v. Sultan of Johore* (6) referred to.]

[Tucker L.J. We have to bear in mind the point that this certificate, not having been given in answer to questions framed by the court, may be slightly ambiguous, so that we, in order to construe it, may have to frame further questions to the Foreign Secretary.]

It is doubtful whether the submission of any further questions could elucidate the matter. His Majesty must be entitled to take the view that, however the Declaration of Berlin might be looked upon by international lawyers, whether or not, for example, they held it to result in a condominium, he has to settle his policy and conduct his foreign relations, and that for his purposes Germany is still a State and that he is at war with it.

[*Aksionairnoye Obschestvo de A. M. Luther v. Sagor & Co.* (7),

(1) [1924] A. C. 797.

(5) *Ibid.* 830.

(2) *Ibid.* 805.

(6) [1894] 1 Q. B. 149, 158.

(3) *Ibid.* 814.

(7) [1921] 3 K. B. 532, 556, 557.

(4) *Ibid.* 823, 824.

the speech of Lord Wright in *Government of Republic of Spain v. S.S. Arantzazu Mendi* (1) and the judgment of Sir Wilfrid Greene M.R., in *Kawasaki Kisen Kaishiki Kaisha of Kobe v. Bantam Steamship Co.* (2) referred to.]

As for the Crown's power to detain the appellant, it is conceded on his behalf that a hostile alien enemy, as opposed to an ordinary alien, can in time of war be detained under the Royal Prerogative, and, being so detained, is not entitled, as against the Crown, to a writ of habeas corpus. Every enemy alien in this country is potentially hostile. [Tucker L.J. He would be committing treason against his own country if he were not.] It is argued for the appellant that the question whether an alien enemy is hostile or not is one for determination by the courts. But that question and the question whether such a person should be detained are, it is submitted, questions for the Executive to determine. The right to decide whether he is hostile is part and parcel of the Royal Prerogative to detain him as a hostile alien enemy. It is an act of state just as much as is the detention of a prisoner of war captured on the field of battle. It is that which is the true ratio decidendi of *Rex v. Vine Street Police Station Superintendent; Ex parte Liebmann* (3). [The judgment of Bailhache J. (4) referred to.] There is no distinction between an alien enemy potentially hostile and a prisoner of war, and it has long been held that a prisoner of war, as such, is not entitled to a writ of habeas corpus.

On the facts, it is arguable whether the applicant ever came within the King's Peace at all. He returned to this country from Ireland in December, 1939, well knowing that, subject to what the advisory committee decided, he would be interned as soon as he arrived. If, on those facts, he did come within the King's protection, the Crown remained entitled to decide that he, being an alien enemy and potentially hostile, ought to be detained in exercise of the Royal Prerogative.

It cannot be said that the mere termination of hostilities ends the Royal Prerogative to detain the applicant. That will only occur with the conclusion of a peace treaty; meanwhile, according to the certificate, a state of war persists. The detention remains good until the state of war is ended or until His Majesty, having reviewed the case, decides that the applicant is no longer hostile, in the sense that his being at

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(1) [1939] A. C. 256, 267, 268.

(3) [1916] 1 K. B. 268.

(2) [1939] 2 K. B. 544, 553.

(4) *Ibid.* 276.

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liberty is no longer detrimental to the interests of this country.

[Tucker L.J. Do the authorities bind this court to hold that an alien enemy cannot even apply for a writ of habeas corpus, or is it merely that the application is, on the facts, bound to fail? If he cannot even apply, then he is without remedy whatever the Executive propose to do to him.]

He may have a remedy other than habeas corpus: *Schaffenius v. Goldberg* (1) shows that an alien enemy who is a prisoner of war has certain rights of civil action, whether or not he is detained. The reason why he cannot apply for a writ of habeas corpus is that, the matter being one for the Royal Prerogative, the action of the Crown cannot be challenged in the courts.

[Tucker L.J. referred to *R. v. Governor of Brixton Prison; Ex parte Sarno* (2).]

Foster in reply. To say that the applicant is not within the King's Peace is to place him in a worse position than a prisoner of war, who is within the King's Peace: see McNair, *Legal Effects of War* (2nd ed., p. 55, note (1.) and the cases there cited). It is dangerous to expand the category of prisoner of war to include persons in the position of the applicant, because prisoners of war are at the mercy of the Executive. If the commandant of his camp decides to depart from the usual practice in such matters and shoot a prisoner, the latter has no remedy by way of habeas corpus. His only hope will be to succeed in launching other proceedings.

The importance to be attached to the fact that hostilities have ceased is that the circumstances have ceased to exist in which a civilian internee might be able to take part, to our detriment, in total war.

[Tucker L.J.: Do you rely on *Ex parte Liebmann* (3) for the proposition that the appellant, though equivalent to a prisoner of war when interned, lost that status with the cessation of hostilities with Germany on May 8, 1945, although his detention continued, and that he could then apply for habeas corpus?]

Yes. The argument for the applicant does not involve that civilian internees who are alien enemies should be released, but simply that they should escape their procedural disability and be enabled to apply for a writ of habeas corpus. The value of the right to make such an application is so great that the

(1) [1916] 1 K. B. 284.

(2) [1916] 2 K. B. 742.

(3) [1916] 1 K. B. 268.

court should be reluctant to cut the right down. The approximation of civilian internees to prisoners of war could only be a municipal arrangement. It could never stand at international law. The statement of Bailhache J., in *Ex parte Liebmann* (1) that a person hostile to this country who is on that account interned may properly be described as a prisoner of war must, it is submitted, be wrong according to international law as recognized by the municipal law of this country. That does not invalidate the statement at municipal law itself, but it should be regarded as a mere form of words.

Cur. adv. vult.

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July 30. The following judgments were read :

SCOTT L.J. (by ASQUITH L.J.). The Divisional Court has held that the applicant is not entitled to a writ of habeas corpus, and the ground of the decision is that he is an alien enemy and, as such, lawfully detained by the Crown. The motive for the application for the writ is undoubtedly the intimation spoken to in the applicant's affidavit that he is to be deported to Germany. I postpone for the moment consideration of the relevancy of this intimation, and assume that his purpose in asking for the writ is merely to challenge the Crown's right to intern him in the United Kingdom.

In support of this contention his counsel, Mr. Foster, made two main points, although he sub-divided his second point. First, he submitted that the applicant, who was admittedly still an alien, was not an alien enemy. On this his essential proposition was that the declaration at Berlin of June 5, 1945, by the United Nations ended the war, with the result that the applicant, who was a natural-born German and had never lost that nationality, although he had lived in England for many years, married an English wife and had children by her, ceased thereupon to be an alien enemy. That contention had much theoretical support in international law, in that the central German government of Germany was thereupon displaced, and its place completely taken by a government composed of the four United Nations. War predicates at least one other State against which the war is waged, and the Declaration of Berlin ended Germany, for the time being, as a separate State. In support of that proposition he argued that a sovereign State which has no sovereign government is a contradiction in terms ; and that, even if such a State be possible in international law,

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a State which has no national government cannot wage a war, or be at war. He further contended that, although the Secretary of State for Foreign Affairs had, on April 2, 1946, certified in the present case that the war was still continuing, and although counsel conceded that *prima facie* such a certificate was, on well recognized principles, normally binding on the court, it was not binding on the facts of the present case, because the declaration of Berlin was the act of the King, and that act was conclusive that the King's Secretary of State for Foreign Affairs had no authority thereafter to certify that the war was still going on. This argument at first sight seems formidable, but in my opinion it rests on a fallacy, which can be stated thus: In the British constitution, which is binding on all British courts, the King makes both war and peace, and none the less so, in the eyes of the law, that he does so as a constitutional monarch upon the advice of his democratic Cabinet. If the King says by an Act of State that the Commonwealth of countries over which he reigns is at war with a particular foreign State, it is at war with that State, and the certificate of the Secretary of State is conclusive; and I do not deviate in order to consider the constitutional position of Eire, which I regard as anomalous. When the King makes peace with an enemy State, that war comes to an end, but it does not come to an end before that peace is made. Whether international law has a different rule is irrelevant; for international law is only binding on our courts in so far as it has been adopted and made part of our municipal law; and the above propositions go, in my opinion, as far as our municipal law has gone.

It follows, therefore, that the certificate of the Secretary of State for Foreign Affairs, which says in terms that we are still at war with Germany, is binding at least in our municipal law, and therefore on all the King's courts. Had it been otherwise, I should have been disposed to hold that the authority of the Secretary of State for Foreign Affairs at any date subsequent to His Majesty's declaration made through his plenipotentiaries at Berlin in June, 1945, was limited by that declaration. For the reasons which I have given, however, I am satisfied that an inference from the declaration, that the King had then brought to an end the state of war, would be erroneous. In our municipal law, whether it differs from international law or not, a state of war can continue, and the war with Germany is continuing, in spite of the fact that Germany then ceased to have any independent central government. The above was the point on which the applicant's appeal mainly rested, and on it I am

satisfied that the judgment of the Divisional Court is right, for the reasons stated in Lord Goddard C.J.'s judgment.

The applicant's alternative argument, put in more ways than one, was in effect this: He conceded that in this court the decided cases made it impossible for him to argue that a prisoner of war had, as against the Executive, any right to a writ of habeas corpus in order to vindicate his right of freedom of residence within the United Kingdom; but he contended that the mere fact of enemy nationality was no bar to that writ, and that internment in a camp by the Executive did not of itself make an alien enemy a prisoner of war. This point had in effect been decided against Mr. Foster's contention by a Divisional Court in *R. v. Superintendent of Vine Street Police Station; Ex parte Liebmann* (1), but he submitted that that decision was wrong. In my opinion it was right, and I think that the decision of the Court of Appeal in *Ex parte Weber* (2), an appeal from which, on the issue of the applicant's nationality, was dismissed by the House of Lords (3) in the following February, was rightly treated by Bailhache and Low J.J. in the Divisional Court in *Ex parte Liebmann* (1) as justifying their decision.

The King, under our constitution, is under no obligation to admit into the United Kingdom, or to retain here when admitted, any alien. Every alien in the United Kingdom is here only because his presence has been licensed by the King. It follows that at common law the King can at will withdraw his licence and cause the Executive to expel the alien, whether enemy or friend: see *Attorney-General for Canada v. Cain* (4), where Lord Atkinson said: "One of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order, and good government, or to its social or material interests." That legal position is not affected by the political consideration, for which this country has in past history justly gained a good reputation, that it is our practice both to welcome alien visitors and, indeed, to give asylum to political refugees. How far the common law position is affected by the series of statutes passed about alien friends it is unnecessary to consider,

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(1) [1916] 1 K. B. 268.

(3) [1916] 1 A. C. 421.

(2) [1916] 1 K. B. 280 (n).

(4) [1906] A. C. 542, 546.

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for the Prerogative was not affected by them as regards alien enemies. Even an alien enemy may live here in perfect freedom under the King's licence, as was pointed out by Lord Goddard C.J., in his reasons for the judgment appealed from ; but, on withdrawing that licence, the King may intern, or even expel, the alien enemy. If in time of war he decides through his appropriate officers of state, primarily the Home Secretary, that considerations of public safety make that course necessary, I think that the alien enemy so interned ipso facto becomes a prisoner of war ; but, in my opinion, the establishment of that status is not a condition precedent to the power of the King to expel any alien enemy. Whether the applicant was or was not, is or is not, a prisoner of war is irrelevant in the present appeal. In truth I can see no half-way house cognizable by the common law between a complete discretion vested in the Royal Prerogative and a concession to alien enemies of rights equivalent to those of British subjects of the King at common law or of alien friends granted to them by statute ; and in their case, it must be remembered, the necessity for control measures called for legislation and defence regulations. What measures should in time of war be taken by the Executive in the case of alien enemies must, it seems to me, necessarily rest in the discretion of the Executive, and the courts must not be tempted into finding reasons for controlling the Executive by the possibility of hardship which may be present in an individual case or can easily be imagined.

Some argument was addressed to us on the footing that aliens residing within the realm under the licence of the King, whether friend or enemy, enjoy the normal rights of subjects of the King in his courts, because they are here within his protection, and therefore owe to him some degree of allegiance. If, then, an alien enemy may so sue and be sued, why should he not be entitled to his writ of habeas corpus ? The answer is plain : as against a subject, or another alien, or any *persona juridica* there is no disqualification ; but, if he seeks the writ in order to vindicate his own freedom from control by the Executive, he is necessarily challenging the very right to control him which is vested under our constitution in the discretion of the King. The argument is therefore wholly beside the point. It follows, in my opinion, that the judgment of Lord Goddard C.J. was right, and that habeas corpus does not lie against the Crown at the instance of an alien enemy interned for the safety of the realm in time of war by an order of the Executive acting within its discretional authority on behalf of

the King. Neither in the above conclusions nor in the reasoning by which it is reached, do I touch on the locus standi in judicio of an alien enemy, whether free or interned, in regard to his legal rights other than the one claim put forward in the present proceedings, that is to say for the grant of a writ of habeas corpus against the King's Executive for the purpose of challenging the King's Prerogative to intern or expel an alien enemy.

The appeal must be dismissed with costs.

TUCKER L.J. I agree that this appeal fails. Mr. Foster's first submission was that the certificate given by the Secretary of State for Foreign Affairs dated April 2, 1946, was ambiguous and that it required further elucidation before the court could be satisfied that a state of war still exists between His Majesty and Germany. His argument was based on the proposition that war can only take place between two sovereign independent States and that the declaration of unconditional surrender referred to in the certificate showed that Germany no longer existed as a sovereign independent State. In my opinion, there can, on the authorities, be no question but that the certificate of the Foreign Secretary given on behalf of the Crown as to the existence of a state of war involving His Majesty is conclusive and binding on this court, and this is so whether questions of fact or law are involved therein. I can see no ambiguity in the certificate in this case, and I think that its third paragraph is conclusive against the applicant.

As to the second point, namely, whether the applicant, who is an alien enemy interned by Executive action in time of war, has a remedy by way of habeas corpus in respect of that detention, I also agree that, in the circumstances disclosed in the present case, he has made out no case for the issue of the writ. The precise grounds on which he is precluded from this remedy, however, are, I think, open to question. It was decided by this court in *Schaffenius v. Goldberg* (1), that an alien enemy resident in this country in time of war, even though interned, has a right to pursue his ordinary civil remedies in the King's courts against the King's subjects, and that the internment of a registered alien enemy does not operate as a revocation of the licence to remain in this country which is implied in registration. On the other hand, in *Rex v. Superintendent of Vine Street Police Station; Ex parte Liebmann* (2), a Divisional Court upheld a preliminary objection by the Solicitor General that the court had no

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jurisdiction to entertain the application on the ground that the applicant was a prisoner of war. He was not a combatant, but an interned alien enemy civilian. Bailhache J., after referring to the presence of spies and modern methods of warfare which would now be described as "total" war, said (1): "I have come to the conclusion that a German " subject resident in the United Kingdom, who in the opinion " of the Executive Government is a person hostile to the welfare " of this country and is on that account interned, may properly " be described as a prisoner of war, although not a combatant " or spy." He was accordingly held to be ineligible for a writ of habeas corpus on the authority of the cases dealing with combatant prisoners. Although the actual decision was given on the preliminary objection, the case was heard on its merits before judgment was delivered, and, after dealing with the preliminary objection, Bailhache J., proceeded (1): "As the " preliminary objection succeeds it is unnecessary to say more ; " but these courts are specially charged to safeguard the " liberty of the subject as one of their most sacred duties. " The courts owe that duty not only to the subjects of " His Majesty, but also to all persons within the realm who are " under His Majesty's protection and entitled to resort to these " courts to secure for them any rights which they may have, " and this whether they are aliens or alien enemies. I think it " right, therefore, to add that, deeply impressed as I am with " the sanctity of the liberty of the subject, I cannot forget that " above the liberty of the subject is the safety of the realm, " and I should be prepared to hold, as at present advised, that " when the internment of an alien enemy is considered by the " Executive Government, charged with the protection of the " realm, desirable in the interests of the safety of the realm, " and the Government thereupon interns such alien enemy, " the action of the Government in so doing is not open to " review by the courts of law by habeas corpus."

For myself, I should prefer this reasoning as the basis for the refusal of the writ, as it shows that the real objection is that an alien enemy cannot be heard to complain against the Crown or its officers in respect of acts done under and within the limits of the Prerogative, whereas the preliminary objection based on the status of prisoner of war appears to me to be open to doubt, and, moreover, to suggest that as a prisoner of war he could not even have habeas corpus against a private citizen who was imprisoning him without any pretence of authority from the

(1) [1916] 1 K. B. 275.

Crown. *Ex parte Weber* (1) is not, I think, conclusive either way as to the precise ground for refusal of the writ.

It does not appear to me to be necessary to pursue this matter further since I am satisfied that in the result *Ex parte Liebmann* (2) was rightly decided, and the present case appears to me to be indistinguishable therefrom. Assuming the applicant's right to be heard, this affidavit, in my view, discloses no case for the issue of the writ, and the mere statement that he has been advised by his solicitors that it is the intention of the Home Office to deport him to Germany does not, in my opinion, establish even a *prima facie* case of excess or abuse of power under the Prerogative.

For these reasons I agree that the appeal fails.

ASQUITH L.J. I agree, but would add something in deference to the argument of Mr. Foster.

His first and more important point is that there is now no war between His Majesty and Germany; hence the applicant cannot be an alien enemy, that term having lost its meaning through the cessation of the war. The argument is that in May or June, 1945, Germany was so obliterated and extinguished that she ceased to be a State or to have a government, and that His Majesty can only be at war with another State or government which is in being. The difficulty with which this argument is faced, is, of course, the certificate of the Secretary of State for Foreign Affairs, which asserts in terms that the German State and German nationality still subsist, and that that State is still at war with His Majesty. Such a certificate is normally conclusive on matters both of fact and law, and I think that Mr. Foster admits that if the certificate in this case had confined itself to asserting that there is a German State with which His Majesty is still at war, its production would have been fatal to his argument. But he contends: (1.) that this certificate refers to, and quotes, the Allied declaration of June 5 on the unconditional surrender of Germany, and, as regards its second paragraph at least—the paragraph in which the continued existence of the German State and German nationality are affirmed—appears to base this affirmation on the terms of that declaration; (2.) that these terms themselves are quite inconsistent with the continued existence of Germany as a State after the summer of 1945.

Speaking for myself, I doubt if these terms are so inconsistent; but I will assume the contrary. On this

(1) [1916] 1 K. B. 280, *n*.

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assumption the answer to Mr. Foster's argument seems to me to be that if, in a certificate of this sort, the conclusions are unqualified and unambiguous, it does not matter whether those conclusions are combined with, or even professedly based on, materials apparently inconsistent with them. *Duff Development Company Ltd. v. Kelantan Government* (1), seems to me a direct authority in support of this proposition. The final paragraph of the certificate—which, in that case, was given by the Secretary of State for the Colonies—asserted in substance that the Sultan of Kelantan was a sovereign (or an independent sovereign; they are the same thing). But an earlier paragraph had recited a treaty between the Sultan and His Majesty whereby the Sultan had seemingly surrendered some of the ordinary adjuncts or incidents of sovereignty. This was held not to invalidate the conclusion that he was a sovereign. So, in my view here, it is the conclusion which is operative, even if—which I do not concede—it be a non sequitur from a preamble or premises which, in the certificate, precede it. The conclusion is that His Majesty is still at war with a still existing German State.

The other issue raised by Mr. Foster, which proceeds on the assumption that the applicant is an alien enemy and has been interned under the Prerogative, is whether he can sue out habeas corpus against the Crown or its agents. On this point I entirely concur with the conclusion of my Lords, that he cannot do so. Speaking for myself only, I would go further and advance the following general propositions as warranted in law:—(1.) It is beyond dispute that the Acts of Parliament relating to the detention of alien enemies, in the wars of both 1914 and 1939, expressly preserved any powers which might exist under the Royal Prerogative in that regard. (2.) This applicant was, and is, detained under these prerogative powers. This appears from the affidavit of the Home Secretary. (3.) The Crown is entitled, in virtue of its Prerogative, to detain an alien enemy. There is no authority which decides the contrary, and *Rex v. Commandant of Knockaloe Camp* (2), *Ex parte Liebmann* (3) and *Ex parte Weber* (4), support the proposition, though in the latter case it was rather assumed than debated. (4.) Whether or not such detention constitutes the detainee technically a prisoner of war—which in my view it well may—he is left free to maintain a civil action in contract against a British subject: *Schaffenius v. Goldberg* (5); and

(1) [1924] A. C. 797.

(4) [1916] 1 A. C. 421.

(2) (1917) 117 L. T. 627.

(5) [1916] 1 K. B. 284.

(3) [1916] 1 K. B. 268.

possibly in tort: *Princess Thurn und Taxis v. Moffitt* (1). Internment does not revoke his licence for this purpose, though in the nature of the case it revokes his licence to remain at large. (5.) Whether or not such a detainee is a prisoner of war, he is disentitled to the remedy of habeas corpus against the Crown or its agents in respect of his detention by them (aliter, possibly, in respect of detention by a private individual). In *Ex parte Liebmann* (2), in which the detainee was indeed held to have the status of a prisoner of war, Bailhache J., as my brother Tucker has pointed out, laid down a wider principle, which I believe to be well founded. (6.) Detention by the Crown of an enemy alien may well be an act of state; such acts, in my opinion, are by no means limited to acts done abroad, in cases at least where the complainant is an alien enemy.

I would say in conclusion that I am unconvinced by counsel's attempted distinction between *Ex parte Liebmann* (2) and the present case. He urged that in that case, decided in 1915, not merely was a war technically proceeding between Germany and His Majesty, but active hostilities, and that those hostilities were "total" war in the sense that any German civilian in this country was a potential spy. If, which I question, this was the sole foundation of the decision in that case, it may well, in my view, be more, rather than less, applicable to-day, when, the combatant forces of Germany having been utterly defeated, no means remain to her for pursuing the struggle beyond underground agencies in Allied countries, acting by way of espionage, propaganda and the like.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for applicant: *Waller, Neale & Houlston, for Marsh & Ferriman, Worthing.*

Solicitor for respondent: *Treasury Solicitor.*

(1) [1915] 1 Ch. 58. (2) [1916] 1 K. B. 268.

TAYLOR v. BRIGHTON BOROUGH COUNCIL.

Local government—Planning scheme—Validity of proposed provision—Land not to be used for fun fair "without consent of Council"—Town and Country Planning Act, 1932 (22 & 23 Geo. 5, c. 48), ss. 11, 12—Town and Country Planning (Interim Development) Act, 1943 (6 & 7 Geo. 6, c. 29), s. 5.

The insertion in a town planning scheme of a provision that the

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use of land for a fun fair is not to be commenced " without the " consent of the council " is within the powers conferred on a local authority by the Town and Country Planning Act, 1932, and therefore a notice of intention to prohibit the use of certain land for a fun fair, based on a resolution to insert such a provision in the council's planning scheme and issued in accordance with s. 5 of the Town and Country Planning (Interim Development) Act, 1943, is a good notice.

CASE STATED by Brighton justices.

On March 13, 1946, a complaint was preferred by the appellant, Taylor, against the respondent council under the Town and Country Planning (Interim Development) Act, 1943, s. 5, and sch. I., by way of appeal against a notice served by the council on the appellant on January 16, 1946, stating their intention to prohibit the use of certain land belonging to the appellant as a fun fair.

At the hearing the following facts were proved or admitted. A resolution to prepare a scheme under the Town and Country Planning Act, 1932, was in force at the date of the commencement of the Act of 1943, and was still in force, with respect to an area which included certain land and buildings, the subject of the present appeal. Certain development of the land in question, consisting of its use for carrying on a fun fair, had been carried out after July 22, 1943, otherwise than in accordance with an interim development order or of a permission granted under that order. On January 16, 1946, the council, acting as interim development authority, served on the appellant a notice under s. 5 of the Act of 1943, stating their intention at the expiration of twenty-eight days to prohibit the use of the land for the purpose of a fun fair on the ground, inter alia, that it was intended to provide in the planning scheme that the use for a fun fair of land, whether forming the site of a building or not, was not to be commenced without the consent of the council. In satisfying themselves that it was necessary and expedient to prohibit the use of the land in question as a fun fair the council had regard to a resolution passed by them on December 14, 1944, resolving that appropriate provisions be included in their planning scheme to the above effect. •

It was contended for the appellant that the intention of the council to prohibit the use of the land as a fun fair was an intention to do something not authorized by the Acts ; that the council had no power to insert in a scheme the proposed provision ; and that the powers conferred by the Act of 1932

were analogous to the powers to make by-laws and must be exercised reasonably.

It was contended for the council that power to insert the proposed provision was conferred by s. 11 of the Act of 1932 : that the doctrine of reasonableness applicable to by-laws did not apply to a planning scheme ; and that even if the question of reasonableness were material, the provision in question was not unreasonable because the council did not propose to prohibit fun fairs absolutely, but merely to make the use of land for that purpose subject to their consent.

The justices held that the council were entitled to take the action proposed in the notice of January 16, 1946, and dismissed the appeal, but stated this case for the opinion of the High Court.

Blanco White K.C., H. A. Hill and Kerrigan for the appellant. No doubt there is power under s. 10, sub-s. 2, of the Town and Country Planning Act, 1932, to make an interim development order permitting the use of land for a fun fair conditionally. But the provision in question in this case is a provision in a permanent scheme and is contrary to the provisions of the Act relating to permanent schemes, namely, ss. 11 and 12. The question therefore depends on the construction of those sections. Sub-section 1 of s. 12 provides that the provisions to be inserted in a scheme with respect to buildings may include provisions " (c) regulating, or enabling the responsible authority to regulate, the size, height, design and external appearance of buildings " and the proviso to that sub-section says that where a scheme contains a provision enabling the authority to regulate the design or external appearance of buildings, the scheme must also provide that any person aggrieved may appeal. In that sub-section the words " enabling the responsible authority to regulate " are to be distinguished from " regulating." In the present case the proposed provision enables the authority to regulate and gives no right of appeal. The Act contemplates a scheme which in itself shows what is permitted, not a scheme in which power is given to the local authority to give or refuse permission. In other words the scheme itself should regulate and there is no power to delegate power to regulate to the local authority. Moreover, the proposed provision is unreasonable because it would give the council complete control over the whole area and because there is no right of appeal. Wherever discretion is given by the Act to the responsible authority there is a right of appeal : see s. 10, sub-s. 5, and s. 12, sub-s. 1 (c).

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Harold Williams for the corporation. Under s. 5 of the Town and Country Planning (Interim Development) Act, 1943, it is conclusive if the authority have proposed at the material date to insert in the scheme such a provision as is in question here. When that Act was passed there was no power to control planning until a scheme had been confirmed or an interim order made. That Act gives power, in s. 5, to enforce control when there is a resolution in force. There is also an express right of appeal given by the schedule to that Act. The position of the local authority in this case is unassailable unless it can be shown that the proposed provision is unreasonable. The contention of the council is that the provision is expressly within the powers conferred by ss. 11 and 12 of the Act of 1932. Paragraph (a) of s. 11, sub-s. 1, which provides that every scheme is to contain such provisions as are necessary or expedient for prohibiting or regulating the development of land, alone would justify it. So also would para. (d) of s. 12, sub-s. 1, which states that the provisions to be inserted in a scheme may include provisions imposing restrictions on the manner in which buildings may be used. The proposed provision is not unreasonable and the magistrates were right in dismissing the appellant's appeal.

Blanco White K.C. replied.

LORD GODDARD C.J. I can state the issue that is raised before us quite shortly in this way: It has been argued on behalf of the appellant that although a scheme under the Act could prohibit a site from being used as a fun fair, it is beyond the powers of the council to provide in a scheme that a building should only be used as a fun fair with their consent; in other words, it has been contended that they can prohibit absolutely but they cannot prohibit conditionally on consent being obtained. It is therefore necessary to examine with some little care the relevant statutes. The Act of 1932, s. 1, gives the scope of planning schemes as follows: "A scheme may be made under this Act with respect to any land, whether there are or are not buildings thereon, with the general object of controlling the development of the land comprised in the area to which the scheme applies, of securing proper sanitary conditions, amenity and convenience." Those are words of very wide import. The procedure which is provided by the Act is this. Under s. 6 a local authority may prepare a scheme with respect to any land in the neighbourhood, after deciding

by a resolution to prepare a scheme. Under s. 8 they have to submit that resolution to the Minister, who may or may not approve it. If he does approve it, certain consequences arise at once from the mere fact that a resolution has been passed. When the scheme is finally prepared and settled, which may not be for several years, it has to be laid before Parliament, after which it is provided that application may be made to the High Court, though Parliament has not rejected the scheme, to have any provisions in it declared *ultra vires*. Since the scheme, before it becomes finally effective, may be postponed for many years, and as it is recognized that development must go on and building must not be stopped altogether in the interim period, provision is made by s. 10 of the Act of 1932 for what is called interim development of land, and under that section it is provided: "The Minister shall make a general order with respect to the interim development of land within the areas to which resolutions to prepare or adopt a scheme apply"—and such a general order has been made—"For the purposes of this section the expression 'interim development' means development between the date on which the resolution takes effect, and the date of the coming into operation of the scheme. (2.) An order made under the preceding sub-section (in this Act referred to as 'an interim development order') may itself permit the development of land either unconditionally or subject to any condition specified in the order, or may empower any authority so specified to permit the development of land in accordance with the terms of the order." So if the order imposed certain conditions the authority could only permit the development of land subject to those conditions. Then it is also provided: "Where an application for permission to develop land is made to the specified authority in manner provided by the order, the authority may, subject to the terms of the order, grant the application unconditionally or subject to such conditions as they think proper to impose, or may refuse the application."

Under s. 11 it is provided: "Every scheme shall define the area to which it applies, and specify, in accordance with the provisions of the next succeeding subsection, the authority or authorities who are to be responsible for enforcing and carrying into effect the provisions of the scheme, and (a) shall contain such provisions as are necessary or expedient for prohibiting or regulating the development of land in the area to which the scheme applies and generally for carrying out any

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" of the objects for which the scheme is made." Here again, I call attention to the very wide words " regulating the development of land." " Land " by the interpretation section, includes any buildings, so it is obvious that under s. 11 the scheme may prohibit the use of buildings for any particular purpose, or it may regulate the use of buildings for any particular purpose. It is also necessary to refer briefly to s. 12, which provides: " The provisions to be inserted in a scheme with respect to buildings and building operations may include provisions . . . (c) regulating, or enabling the responsible authority to regulate, the size, height, design and external appearance of buildings ; (d) imposing restrictions upon the manner in which buildings may be used, including, in the case of dwelling-houses, the letting thereof in separate tenements ; and (e) prohibiting building operations, or regulating such operations in respect of matters other than those specified in this subsection."

In 1943, the Town and Country Planning (Interim Development) Act was passed. That, among other things, put the whole of the land in England into the position that it was deemed to be the subject of a resolution, whether a resolution had in fact been passed or not. In other words, all land now is to be regarded as though the Town and Country Planning Act and some scheme had been applied to it. Section 5 provides: " If while a resolution to prepare or adopt a scheme under the principal Act is in force with respect to any area "—as it is in the case of Brighton—" any development of land within that area is carried out after the commencement of this Act otherwise than in accordance with the terms of the interim development order or of permission granted under that order, then, subject to the provisions of this section, the interim development authority may, if they are satisfied that it is necessary or expedient so to do having regard to the provisions then proposed to be included in the scheme—(a) where the development consists of the erection, construction or carrying out of any building or work or any part of a building or work, remove or pull down the building, work or part ; (b) where the development consists of any use of the land or any building thereon, by order prohibit that use, and, where necessary, reinstate the land." Then there is a provision in sch. I. to that Act providing that: " If any person served with such a notice as aforesaid desires to dispute any allegation contained therein, he may, by written notice served on the clerk of the

"court and on the interim development authority within
 "twenty-eight days from the date of the service of the original
 "notice on him, appeal to a court of summary jurisdiction."
 That is what has been done here.

It seems to me that the object of this legislation, so far as interim development is concerned, is to provide that once the council has embarked upon a course of town planning, people are not to be allowed in the interim, that is to say, between the date of the resolution and the date of the scheme coming into effect, to build or use or develop the land in such a way as will be contrary to the scheme if it subsequently comes into effect. It is very reasonable that that should be so, because you do not want to have schemes entirely wrecked by the fact that at the time the scheme comes into operation the district has been developed in some way which would render the scheme nugatory. You also do not want people to be expending money, perhaps in ignorance of the fact of these schemes, when it would be found that by so doing they would be offending against the scheme. So Parliament has made provisions for the interim development authority controlling the matter during the interim period.

The sole point now before us is this. In the Brighton scheme it is intended, when the scheme becomes perfect, that there should be a provision "that the use for a fun fair of land, whether forming the site of a building or not, shall not be commenced without the consent of the council." Mr. Blanco White's argument is that that would delegate something under the scheme to the discretion of the council; that that is not permitted; but that the scheme must say either that a fun fair is prohibited or that a fun fair is permitted in any particular area under the scheme. He contends, for instance, that you could prohibit—taking an instance in Brighton—the use of a building as a fun fair in West Street, and at the same time you could permit land, say, in Old Steyne, to be used as a fun fair, or you could say no land or building shall be used as a fun fair within, perhaps, a radius of half a mile of the Palace Pier: you could prohibit it altogether, but you must not say "Land shall not be used in West Street or any other street in Brighton for a fun fair without the consent of the council." I am wholly unable to accede to that argument. The Act says in its first section that the scheme can be made with the general object of controlling the development of land, and in ss. 11 and 12 we find provisions for regulating the use or development of

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land. Surely no better means of control or regulation can be found than by saying that you shall not do something or other, or use your land for some purpose or another, unless with the consent of the local authority. That is one method of controlling and regulating. The consequences of deciding the contrary would be somewhat serious, because the conditions in any town or countryside may change rapidly from time to time, and what may be a perfectly reasonable control or regulation in the year 1946 might be a wholly unreasonable or undesirable regulation in the year, let us say, 1950 or 1956. One part of the town might alter to such an extent that the council would say : " Although we have hitherto granted fun fairs in this part of " Brighton, or this part of our area, we are no longer going to do " so because the character of that part has changed ; whereas " although we formerly would not have given leave to have " a fun fair in West Street, now West Street has so changed " that we think it is a very proper place to have one if anybody " wants to." Surely it is a desirable thing that in these matters there should be a certain amount of elasticity and provision for local authorities adjusting their regulations or their prohibitions as circumstances may arise. It is not a good answer to say that the scheme can be altered, because that means that a new scheme would have to be prepared and go before the Minister for final approval, which takes a great deal of time. If I thought that on a fair construction of the Act it was impossible to provide for a prohibition without the consent of the council, then I should have to give effect to it ; but it seems to me that the proposed provision is strictly within the words of the Act because that is only one method of regulation or control, and if a local authority has power to control, they must of necessity, in exercising such power, be entitled to impose conditions.

The part of the argument of Mr. Blanco White which impressed me most at first was that in which he referred to s. 12 sub-s. 1 (c), which provides for the inclusion in a scheme of provisions for regulating or enabling the responsible authority to regulate the size, height, design and external appearance of buildings, and said : " If Parliament intends the " responsible authority, when once the scheme has been " approved, to have any discretion in the matter, it gives it in " express words." But I think when one reads the whole section one sees at once why those words " or enabling the " responsible authority to regulate " appear in that section.

It is because in respect of that matter s. 12 provides a particular method of appeal where the scheme itself does not regulate but enables the responsible authority to regulate. I need not go into all the other matters which have been argued with regard to the right of appeal, and so forth. It seems to me clear that there is a right of appeal to the Minister against the withholding of the consent, but that is not the point we have to decide. The point we have to decide is whether the insertion of the words "without the consent of the council" would be ultra vires in that scheme. If they are not, it follows that the council had the power under s. 5 to object and to take the action which they did. In my opinion, the decision of the magistrates was right, and therefore this appeal must be dismissed with costs.

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HENN-COLLINS J. I agree, and I only desire to add this. The argument of the appellant, as I see it, is that while the scheme may include provisions restricting the manner in which buildings may be used, those restrictions must be crystallized, as it were, at the moment the scheme is first adumbrated and cannot in any sense be included lawfully in the scheme unless they are so defined or if there is some residual power of alteration in the local authority. There is no such express provision in the Act. It is only to be found, if at all, by implication, but when one recollects that provision is being made, as it were, to-day for what may happen in the course of years and years hereafter, it seems absurd, if I may say so, to suppose that we can to-day fix restrictions which will be effective and proper in another fifty, sixty, or whatever number of years. There is no *prima facie* reason for making any such implication in the Act and I do not see any ground upon the construction of it other than the suggestion that under s. 12, sub-s. (1.), there is a reference enabling the responsible authority to regulate a matter with which my Lord has dealt in his judgment, and about which I do not want to say any more. For these reasons, I agree that the appeal should be dismissed.

CASSELS J. I agree. It would indeed be a curious position, after twenty years of legislation dealing with town planning and control and use of and development of buildings and land, and after local authorities have concerned themselves in the preparation of planning schemes and development between the date when the resolution is passed and the scheme comes into

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Cassels J.

operation, that a garage in the middle of a town should be turned into what is known as a fun fair and the local authority should be powerless to deal with the position. In December, 1944, the responsible authority passed their resolution. In 1945, the appellant became the lessee of this building and started a fun fair. On January 16, 1946, the council, as the interim development authority, served notice under s. 5 of the Act of 1943 on the appellant telling him that they proposed at the end of twenty-eight days to prohibit the use of the land as a fun fair. The appellant preferred a complaint to the magistrates. They dismissed his complaint. He appeals to this court and says that the resolution of the local authority is ultra vires and illegal. I agree that the resolution is intra vires for the reasons which have been given by my Lords. The submission of unreasonableness is without foundation, assuming that in this case it is a proper submission to make.

Appeal dismissed.

Solicitors for the appellant : *Kenneth Brown, Baker, Baker.*

Solicitors for the council : *Sharpe, Pritchard & Co., for J. G. Drew, Town Clerk, Brighton.*

H. A. P.

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July 30.

MORE O'FERRALL, LIMITED v. HARROW URBAN DISTRICT COUNCIL.

Lord Goddard
C.J.,
Henn-Collins
and
Cassels JJ.

Local government—Planning scheme—Advertisement hoarding—Injury to amenity—Matters to be taken into account—Other hoardings—Town and Country Planning Act, 1932 (22 & 23 Geo. 5, c. 48), s. 47.

Quarter sessions—Case stated—Decision of quarter sessions not unanimous—Not to be mentioned in the case.

In deciding whether an advertisement hoarding seriously injures the amenity of land within the meaning of s. 47 of the Town and Country Planning Act, 1932, the court should take into consideration the fact that any other matters or things existing at or near the site of the hoarding in question may lawfully be removed.

Where therefore a local authority, acting under that section, served on the owners of an advertisement hoarding a notice requiring its removal and on appeal to quarter sessions it was proved that there were at or near the site of that hoarding three other hoardings as to which the authority had served notices requiring their removal but which had not been removed at the date of the hearing :—

Held, that quarter sessions were wrong in taking the existence of the other hoardings into account in deciding whether the hoarding complained of seriously injured the amenity of the land.

When a case is stated by quarter sessions, the fact that the decision of quarter sessions was the decision of the majority and not the unanimous decision of the court ought not to be mentioned in the case.

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CASE STATED by Middlesex quarter sessions.

More O'Ferrall, LD., respondents to the present appeal, appealed to quarter sessions against an order made by justices dismissing an appeal by the company against the requirements of a notice, dated August 18, 1945, served on them by the appellant council requiring the removal of a certain advertisement hoarding.

At the hearing before quarter sessions the following facts were proved or admitted. The appellant council, acting under the Town and Country Planning Act, 1932, made a scheme in respect of certain land within their district which came into force on July 22, 1939. In June, 1945, the respondent company erected an advertisement hoarding on a piece of land within the area covered by the scheme which had been specified as land to be protected in respect of advertisements pursuant to s. 47 of the Act (1). The hoarding in question was about 48 feet long and 12 feet high and displayed an advertisement of "Clarke's Blood Mixture." Behind the hoarding was a small spinney and to the south of the spinney was an area of good class residential property. To the north of the spinney there were three other hoardings. Between the hoarding in question and the road was a disused static water tank and on the road frontage there were three shops with flats over. The three other

(1) Town and Country Planning Act, 1932, s. 47, sub-s. 1: "Where
 " it appears to the responsible
 " authority that an advertisement
 " displayed or a hoarding set up in
 " the area to which a scheme
 " applies seriously injures the
 " amenity of land specified in the
 " scheme as land to be protected
 " under this Act in respect of
 " advertisements, the authority
 " may serve . . . upon the owner
 " of the advertisement or hoarding
 " a notice requiring him to remove
 " it. . . ." Sub-section 6: "The

" powers conferred upon a
 " responsible authority by sub-ss.
 " (1.) and (4.) of this section shall
 " not be exerciseable—
 " (iv.) during the period of five
 " years from the coming into
 " operation of the scheme, in
 " respect of hoardings erected or in
 " use for advertising purposes
 " before the date when the reso-
 " lution to prepare or adopt the
 " scheme took effect, or advertising
 " stations used by advertising
 " contractors at that date . . ."

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hoardings were erected before 1939 and at the date of the hearing before quarter sessions the council had served on the persons responsible therefor notices pursuant to s. 47 of the Act requiring their removal, but the hoardings had not then been removed. On the other side of the road, outside the area of the council, were a petrol filling station, a public house and a factory.

It was contended for the council that the amenity to be protected by s. 47 was the amenity which would be enjoyed if the hoarding complained of had not been erected and that the protection of amenity afforded by the section was not qualified or diminished by there being other matters or things which injured or might injure the amenity of the land. It was further contended that, in determining whether there was injury to amenity and whether such injury was serious within the meaning of s. 47, the court ought not to have regard to the presence of other matters or things which, injuring or being likely to injure amenity, were of such a kind or existed in such circumstances that the council might lawfully take steps to remove them or eliminate any injury to amenity caused thereby, and therefore the court ought not to have regard to the other three hoardings or the static water tank.

For the company it was contended that in considering what was the amenity of the land in question, regard might be had only to the circumstances existing at the date of the hearing and that the question whether the hoarding complained of seriously injured the amenity of the land ought to be considered by taking into account all matters and things at or near the site thereof which were or might be injurious to amenity.

Quarter sessions held that the contention of the company was correct and, taking into account, inter alia, the matters and things proved before them to exist at or near the site of the hoarding complained of at the date of the hearing, they found as a fact that the hoarding complained of did not seriously injure the amenity of the land. They therefore allowed the appeal, but at the request of the council stated this case for the opinion of the High Court.

Richard Phillips (*Havers K.C.* and *L. F. Sturge* with him) for the council. The question is whether there was injury to the amenity of the land and, if so, whether such injury was serious within the meaning of s. 47 of the Town and Country Planning

Act, 1932. It was not right to have regard only to the circumstances existing at the date of the hearing before the magistrates, as the company contended, since the council had already given notice to the owners of the other hoardings to remove them and those hoardings at any rate ought therefore to be disregarded. The power of a local authority to clear off all advertisements after five years is recognized in sub-s. 6 of the section. The decision of quarter sessions was therefore wrong and ought to be reversed.

Lyons K.C. and *Squibb* for the company. The words of s. 47 must be read as they are. Sub-section 3 says that if on appeal to a court of summary jurisdiction the court are satisfied that the advertisement "does not seriously injure the amenity" of the land the court is to allow the appeal and so on. "Does not" must mean "does not now." The magistrates were therefore right in taking into account the other hoardings and every other material factor existing at the date of the hearing.

LORD GODDARD C.J. In this case the urban district council came to the conclusion—and the petty sessions upheld them—that the amenities were seriously injured by this advertisement. *Prima facie* the question whether or not a particular hoarding seriously injures the amenity of land is a question of fact, but quarter sessions have told us the respective contentions that were put before them on either side, and that they decided the question upon the contentions that were put forward by the owners of this hoarding, and when you see what those contentions were, it is obvious that quarter sessions, in coming to the decision of fact, were not directing their minds to the right question. It appears that they came to the conclusion that if you find a dozen or more hoardings all round this place, you cannot say that the amenities of the neighbourhood are affected by the presence of an extra one. If that were right, in such a state of affairs they could never get rid of advertisements at all, because as often as they attacked each one they would say: "There are half a dozen there, and half a dozen there, and therefore we cannot get rid of this one." It is clear from para. (iv.) of sub-s. 6 of s. 47 of the Town and Country Planning Act, 1932, that that is not the intention of that Act. That paragraph, in effect, says that for five years after the resolution zoning the land you must leave alone any advertisements which are already on the site, obviously implying that after the five years have gone by you can get

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rid of all these advertisements. In fact the case finds, and we are told, that notices have been served upon the proprietors of the other advertisement hoardings or stations in the neighbourhood.

In my opinion, therefore, quarter sessions have unduly limited themselves. They must take into account the fact that these other advertisements may be removed, and that the council are already taking steps to remove them. In so far, therefore, as they allowed themselves to be influenced by the conditions as they existed simply at the date of the hearing, I think they were wrong. This court cannot say that they must necessarily come to another decision, but I think that the case should go back to them with an intimation of this court that the contention of the Harrow Urban District Council was correct and the contention of More O'Ferrall, Ld. was wrong; and that they should reconsider the case in view of that expression of the opinion of the court.

I have only one other matter to add, and that is that twice in this case it is stated that the conclusion to which quarter sessions came was a conclusion by a majority. That should not be stated in a case. It is the decision of the court of quarter sessions that comes before us, and it matters not whether it is a majority or a unanimous decision. That is only put in, I suppose, to try to tell the court: "There must be something in this, for at least some of us took a different view." Those words should never appear in any case stated for the opinion of this court.

HENN-COLLINS J. I agree and have nothing to add.

CASELS J. I agree.

Appeal allowed.

Solicitors for the council: *Sharpe, Pritchard & Co., for H. Wells, Harrow.*

Solicitor for the company: *Charles T. Nicholls.*

H. A. P.

TRAVERS v. GLOUCESTER CORPORATION AND OTHERS.

1946

May 27 ;
July 15, 16,
23.

Lewis J.

Negligence—Builder, owner and landlord of a house—Defective and dangerous installation of a geyser—Landlord's knowledge of defect—Consequent death of tenant's lodger by being gassed—No duty to lodger—Proximate relationship—Opportunity to inspect.

The vent pipe of a geyser terminated against the outside wall, and under the eaves, of a house, built under the direction of the architect of, and owned by, a municipal corporation, being first let by them in 1938. The installation of the geyser was dangerous and the defect had been brought to the attention of the responsible officials of the corporation by the local gas company. In 1942, T., who had been a lodger of the tenant of the house for ten months, was gassed and died in the bathroom of the house as a result of the defective and dangerous installation :—

Held, that there was no legal duty incumbent on the corporation as the builders, owners or landlords of the house towards the lodger to take care in the provision of the installation. The principle laid down in *Donoghue v. Stevenson* [1932] A. C. 562, was inapplicable.

Cavalier v. Pope [1906] A. C. 428 ; *Bottomley v. Bannister* [1932] 1 K. B. 458 and *Otto v. Bolton and Norris* [1936] 2 K. B. 46, followed.

ACTION.

The plaintiff Edith Lucy Travers, was the mother, and a dependant, of Richard Gordon Baskerville Travers, who died from accidentally inhaling carbon monoxide fumes emitted from a geyser into the bathroom of 24, Malmesbury Road, in the city of Gloucester, when Mr. Travers was taking a bath between 8.15 and 9 a.m. on March 12, 1942. There was a strong wind blowing at the time.

The first defendants were the Corporation of the City of Gloucester ; the second, the Gloucester Gas Light Co. ; and the third, the Building and Public Works Construction Co., Ltd.

No. 24, Malmesbury Road was one of 264 houses built by the corporation under a contract dated June 15, 1935, made between the corporation and the construction company. The house was finished on October 12, 1938, and first occupied on October 17 by a Mr. Taylor, the tenancy being transferred at a later date, when he became a prisoner of war, to Mrs. Taylor, his wife. Mr. Travers on March 12, 1942, had been a lodger at the house for ten months. On the outside of Mrs. Taylor's rent book was a notice that : " Any damage or defects should " be reported at once to the Estates Manager," and

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condition 9 (c) of the tenancy agreement was :—" The tenant " shall immediately notify the Estates Manager " of any damage or defect other than that to be made good by " the tenant."

The specification in the contract of June 15, 1935, provided:—" Geysers. Provide for fixing over each bath one Wheeler's " Standard Copper Geyser on brackets and having galvanized " baffle with all bends, straights and cowl, and fitted with " safety locking device." Provision No. 50 of the contract was : " The work shall be executed in such manner and at " such times as the architect may direct." In accordance with the contract and specification Wheeler's Geysers were installed in these houses, including No. 24, Malmesbury Road, under the direction of the architect and on January 29, 1940, a final certificate was issued to the construction company in respect of the houses. The vent pipe terminated under the eaves of the house instead of rising above the eaves. In 1924 the National Gas Council had issued a booklet of " Instructions " for fixing geysers for the use of gas fitters," in which it was pointed out that the termination of the vent should not be under the eaves but above them.

On September 3 and 4, 1936, the Gloucester Gas Light Company had written to the corporation pointing out that certain corporation houses had geysers without a suitable vent pipe and baffle. The geysers in these cases were without a vent pipe and baffle, but had a vent trap in the ceilings of the bathrooms. In 1937, vent pipes and baffles were provided by the corporation for these houses and the ends of the vent pipes were so placed as to come above the eaves.

On January 23, 1941, the Gloucester Gas Light Company drew the attention of the corporation to the unsatisfactory manner in which the vents were fitted in the houses built under the contract of June 15, 1935. In nineteen of the houses improved vent pipes were fitted before March 12, 1942, and after that date some sixty other houses, including No. 24, Malmesbury Road were so fitted, the vents then terminating above the eaves.

The plaintiff brought her action claiming damages under Lord Campbell's Act against the defendants or one or other of them. The action came on for hearing before Singleton J. at the Gloucestershire Assizes in October, 1945, when the second defendants were dismissed from the action and leave granted to amend the statement of claim against the first and

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third defendants with consequent amendments in their defences by those defendants. The action eventually came on for hearing before Lewis J. at the Summer Assize on May 27, 1946. The allegation in the statement of claim then was that Mr. Travers' death was "due to the negligence of "the person or persons who installed in the said dwelling-house the said geyser which was a dangerous apparatus." The particulars of negligence were: "The vent pipe was "carried through the outside wall of the said house and "terminated against the said outside wall and immediately "beneath the eaves of the roof of the said house and no "efficient baffle was fitted in the said vent pipe; the said "defective installation caused and/or permitted a down-draught into the combustion chamber of the said geyser, "resulting in inadequate combustion and the generation of "carbon monoxide gas." The plaintiff claimed that the geyser and system of ventilation was installed by the first and third defendants or by one of them or by the third defendants as agents for the first defendants.

The corporation, the first defendants, pleaded that they owed no duty to the deceased and were not in breach of any duty to him and that the construction company, the third defendants, were not their servants or agents but were independent contractors in the construction of the geyser and ventilation system.

They also pleaded that the deceased by his own negligence caused or contributed to his death by remaining in a small bathroom whilst the geyser therein was alight without making certain that the said room was adequately ventilated, particularly having regard to the fact that a strong wind was blowing at the time.

The third defendants, the construction company, pleaded that the statement of claim disclosed no cause of action against them, denied that they were guilty of negligence and stated that by the contract of June 15, 1935, the geyser and system of ventilation were installed by them in accordance with the plans and specifications prepared by the corporation's architect and under his direction and they claimed an indemnity for costs against the corporation. They also pleaded that the deceased by his own negligence caused or contributed to his death. On the application of the plaintiff, Lewis J. allowed the following paragraph to be added to the statement of claim: "The first defendants were negligent in that they

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" failed to warn the occupiers of 24, Malmesbury Road, that
 " the said geyser and vent pipe, as installed, were defective
 " and dangerous notwithstanding that they were expressly
 " so informed by the Gloucester Gas Light Company by "
 certain specified letters.

Two expert witnesses were called. Captain Benson for the plaintiff said that the method of installation was contrary to all accepted principles, since when a wind impinged on the wall or under the eaves of a house, a zone of still air at higher pressure than the air on the other side was set up, with the result that a down draught was created which, meeting the products of combustion from the geyser, became diluted and was carried into the combustion chamber, thus interfering with the combustion and causing carbon monoxide to be produced and discharged into the bathroom. The extent of the down draught varied according to the force and direction of the wind.

Dr. Thomas called for the corporation said that, wherever you put the flue terminal, in a certain condition of wind and weather you would have a danger of down draught and of fumes going down the pipe. In cross examination he admitted that if in 1935, the architect of the corporation had consulted an expert as to the safest way of ventilating the geyser, he would have been told that the vent should terminate above the eaves of a house.

There was evidence that there had been a smell of gas in the bathroom of 24, Malmesbury Road on occasions for some time before the date of Mr. Travers' death and that persons taking baths at this house suffered from headaches.

The case was adjourned to London, for legal argument.

H. H. Maddocks for the plaintiff. In view of the evidence, the case for the plaintiff is now directed mainly against the first defendants, the Gloucester Corporation. The plaintiff was right in joining the Building and Public Works Construction Co., Ltd., but it now appears that that company worked under the first defendants, subject to inspection of the works by them; that there was in fact such inspection, and that there was, therefore, no such proximity between the company and the deceased as to throw a duty of care on the company towards the deceased: *Buckner v. Ashby and Horner, Ltd.* (1).

A person who installs dangerous apparatus negligently is

(1) [1941] 1 K. B. 321.

liable to anybody injured in consequence of that negligence : *Dominion Natural Gas Co., Ltd. v. Collins and Perkins* (1). That decision was approved in *Donoghue v. Stevenson* (2) : see per Lord Buckmaster (3) and Lord Atkin (4). The principle laid down in *Donoghue v. Stevenson* (2) is that a person who puts into circulation an article, in circumstances which prevent the distributor or the ultimate purchaser from discovering any defect by inspection, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect liable to cause injury to health. That principle is applicable here as between the defendant corporation, who made this defective installation of a geyser, and the deceased man, Travers, who was gassed and killed by it. That principle which applies not only to manufacturers but also to suppliers or repairers of an article (*Herschtal v. Stewart and Ardern, Ltd.* (5)), was followed in *Brown v. Cotterill* (6) where the plaintiff was held entitled to recover damages in respect of an injury caused to him by the fall of a tombstone erected by the defendants in a churchyard. The defect there was in something attached to the land. The same principle was applied in *Malfrout v. Noxal, Ltd.* (7) where the plaintiffs were injured by an accident to a motor cycle and sidecar caused by the negligence of the defendants in fitting the sidecar.

A geyser is an apparatus which involves danger and there was therefore a duty on the part of the corporation, under whose orders this geyser was installed, towards those who, they would know, must come into contact with it : see per Goddard L.J. in *Paine v. Colne Valley Electric Supply Co., Ltd.* (8). It does not make any difference that there was a possibility of examination by the deceased man, if such examination could not reasonably be anticipated by the defendants : *Herschtal v. Stewart and Ardern, Ltd.* (5). It is true that in *Bottomley v. Bannister* (9) it was held that the builder and owner of a house was not liable to a purchaser in respect of any injury caused by reason of any defect in the house rendering it dangerous and that in *Otto v. Bolton and Norris* (10) Atkinson J. held that the law as stated in *Bottomley v. Bannister* (9) had not been altered by the

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(1) [1909] A. C. 640.

(2) [1932] A. C. 562.

(3) Ibid. 569.

(4) Ibid. 596.

(5) [1940] 1 K. B. 155.

(6) (1934) 51 T. L. R. 21.

(7) (1935) 51 T. L. R. 551.

(8) (1938) 55 T. L. R. 181, 183.

(9) [1932] 1 K. B. 458.

(10) [1936] 2 K. B. 46.

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subsequent decision of the House of Lords in *Donoghue v. Stevenson* (1). But *Otto v. Bolton and Norris* (2) is distinguishable from the present case on two grounds: (i.) that plaster on a ceiling (which had caused the injury in that case) is not in itself a dangerous thing, and (ii.) that in the case of a sale of real property, the purchaser normally has an inspection made. In the present case there may have been ample opportunity to inspect, but it was not reasonable in the circumstances to expect that the occupiers of the house would carry out an inspection. *Davis v. Foots* (3) is also distinguishable on the particular facts of that case and also on the ground that in that case the defect (a leak of gas) might easily have been discovered.

R. C. Hutton for the corporation. This geyser became attached to the house and so, realty. The corporation as landlords of the house were under no duty to any person who came to live in the house to take reasonable care that it was well-constructed and safe: *Robbins v. Jones* (4) and *Cavalier v. Pope* (5). Nor would they owe any such duty if the corporation had sold the house: *Bottomley v. Bannister* (6). And this is so even when the defect is due to the landlord's construction and within his knowledge: *Bottomley v. Bannister* (6) and *Davis v. Foots* (3). The law as stated in these cases has not been altered by the decision of the House of Lords in *Donoghue v. Stevenson* (1): *Otto v. Bolton and Norris* (2). See also *Paine v. Colne Valley Electric Supply Co., Ltd.* (7). Even if the case of *Donoghue v. Stevenson* were applicable to this geyser, after it had become part of the realty, there was ample opportunity for inspecting it, since 1938, when the house was first occupied. See the judgment of Lord Atkin in *Donoghue v. Stevenson* (1) and of Goddard L.J. in *Haseldine v. C. A. Daw and Son, Ltd.* (8). Lastly, the deceased man, Travers, by his own negligence caused or contributed to his death.

Lyne for the Building and Construction Co., Ltd.: This house was built for the corporation by the company as the agents of the corporation. The geyser was installed under the direction of the architect. Before the company handed over the house to the corporation there was in fact an inspection of the house by the corporation. There is, therefore, no such

(1) [1936] 2 K. B. 46.

(2) [1932] A. C. 562.

(3) [1940] 1 K. B. 116.

(4) (1863) 15 C. B. (N. S.) 221.

(5) [1906] A. C. 428.

(6) [1932] 1 K. B. 458.

(7) 55 T. L. R. 181, 183.

(8) [1941] 2 K. B. 343.

proximity of relationship between the company and the deceased man as to render the company under a duty towards him: *Donoghue v. Stevenson* (1) and *Buckner v. Ashby and Horner, Ltd.* (2).

Maddocks in reply. The decision in *Donoghue v. Stevenson* (1) though dealing with the liability of a manufacturer of ginger beer sold in a dark opaque bottle—a chattel—to its consumer, stated a general proposition of law as to nexus of liability in tort. It dealt with the proximity of relationship which creates the duty to take reasonable care. The landlord, here, the corporation, was the person who installed at this house a chattel, which, when installed, was defective and dangerous. It is, and must necessarily be, immaterial that the person who did this was the landlord. The decision in *Bottomley v. Bannister* (3), no doubt, was correct, but the obiter dictum of Scrutton L.J. at page 468, which forms the first paragraph of the headnote, would never have been uttered, if the judgment in *Donoghue v. Stevenson* (1) had been extant. The editors of Clerk and Lindsell on Torts (9th and last ed., 1937), at pp. 502–3, state the three grounds for the decision of *Bottomley v. Bannister* (3) the first being: “that the “installation was part of the realty and no duty was owed in “respect of it to a purchaser.” The editor’s comment is that it may be doubtful whether this ground can be maintained “having regard to the fact that the apparatus was designed to “deal with such a dangerous thing as gas.” To keep the point open, I submit that the decision in *Buckner v. Ashby and Horner, Ltd.* (2) is wrong and that, therefore, the plaintiff is entitled to judgment against the Building and Construction Company.

Cur. adv. vult.

July 23. LEWIS J., in a written judgment, having stated the facts, said that Dr. Thomas had failed to satisfy him that the conclusions of Captain Benson were erroneous. He found that (1.) the geyser, as installed by the construction company, under the direction of the corporation’s architect, was unsatisfactory and dangerous, the vent pipe terminating under the eaves of the house (instead of rising above them, so as to ensure that fumes did not descend into the bathroom); (2.) in view of the warnings given to them by the Gloucester

(1) [1932] A. C. 562.

(2) [1941] 1 K. B. 321.

(3) [1932] 1 K. B. 458.

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Gas Light Company, the corporation, by their officials, knew that the installation, as put in, was dangerous ; and (3.) that the death of the plaintiff's son was due to that installation.

He continued : Mr. Maddocks, at the outset of his argument, said that he felt he had no case against the contractors, who had acted as agents for the corporation under the instructions of their architect, and he could find no fault with them. He referred me later to *Buckner v. Ashby and Horner, Ltd.* (1), where Atkinson J. held that contractors whose duty it was to do the work to the satisfaction of the corporation of the City of London, who had inspected and passed the work (in this particular case by giving the final certificate), owed no duty to the plaintiff. That decision was affirmed by the Court of Appeal. But as against the corporation he contended that where a person installs in a dwelling-house a dangerous apparatus negligently he is liable to anyone injured as a result of that negligence, and that the corporation were, through the construction company, their agents or servants, who had in fact done the work, liable to the plaintiff. It was argued that the decision of the Privy Council in *Dominion Natural Gas Co., Ltd. v. Collins* (2), was an authority which covered this case. As in the present case, the installation in that case was a dangerous thing ; but the appellants in that case were the distributors of gas as a commercial product and had negligently erected an installation on the premises of a railway company and thereby injured Collins, who was employed by the railway company. The circumstances of that case were very different from those in the present case, and the duty owed by the corporation to the deceased man in this case was not the duty owed by the gas company to Collins. But that case was decided before the decision in *Donoghue v. Stevenson* (3) and it was said that the opinion of the majority of their Lordships in the House of Lords in that case had extended the principle of the duty owed by a person who installed a dangerous thing to third parties. The headnote in that case (which in my opinion quite correctly sets out the decision of their Lordship's House) reads as follows :—" By Scots and " English law alike the manufacturer of an article of food, " medicine or the like, sold by him to a distributor in circum- " stances which prevent the distributor or the ultimate " purchaser or consumer from discovering by inspection any

(1) [1941] 1 K. B. 321.

(3) [1932] A. C. 562.

(2) [1909] A. C. 640.

"defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health." Lord Atkin, with Lord Thankerton and Lord Macmillan, was in the majority; Lord Buckmaster and Lord Tomlin dissented. In stating his opinion, Lord Atkin, in a passage which is now very well known, said as follows (1): "At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven v. Pender* (2), as laid down by Lord Esher (then Brett M.R.), when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in *Le Lievre v. Gould* (3). Lord Esher says: 'That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.' So A. L. Smith L.J. (3): 'The decision of *Heaven v. Pender* (2) was founded upon the principle, that a duty to take due

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(1) [1932] A. C. 580.

(3) [1893] 1 Q. B. 491, 497, 504.

(2) (1883) 11 Q. B. D. 503, 509.

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“ ‘care did arise when the person or property of one was in
 “ ‘such proximity to the person or property of another that,
 “ ‘if due care was not taken, damage might be done by the
 “ ‘one to the other.’ I think that this sufficiently states the
 “ truth, if proximity be not confined to mere physical proximity,
 “ but be used, as I think it was intended, to extend to such
 “ close and direct relations that the act complained of directly
 “ affects a person whom the person alleged to be bound to
 “ take care would know would be directly affected by his
 “ careless act. That this is the sense in which nearness of
 “ ‘proximity’ was intended by Lord Esher is obvious from his
 “ own illustration in *Heaven v. Pender* (1) of the application
 “ of his doctrine to the sale of goods. ‘This’ (that is, the
 “ rule he has just formulated) ‘includes the case of goods, etc.,
 “ ‘supplied to be used immediately by a particular person
 “ ‘or persons, or one of a class of persons, where it would be
 “ ‘obvious to the person supplying, if he thought, that the
 “ ‘goods would in all probability be used at once by such
 “ ‘persons before a reasonable opportunity for discovering
 “ ‘any defect which might exist, and where the thing supplied
 “ ‘would be of such a nature that a neglect of ordinary care
 “ ‘or skill as to its condition or the manner of supplying it
 “ ‘would probably cause danger to the person or property
 “ ‘of the person for whose use it was supplied, and who was
 “ ‘about to use it. It would exclude a case in which the
 “ ‘goods are supplied under circumstances in which it would
 “ ‘be a chance by whom they would be used or whether they
 “ ‘would be used or not, or whether they would be used before
 “ ‘there would probably be means of observing any defect,
 “ ‘or where the goods would be of such a nature that a want
 “ ‘of care or skill as to their condition or the manner of
 “ ‘supplying them would not probably produce danger of
 “ ‘injury to person or property’.”

Then Lord Atkin, having cited that passage, says (2):
 “ I draw particular attention to the fact that Lord Esher
 “ emphasizes the necessity of goods having to be ‘used
 “ ‘immediately’ and ‘used at once before a reasonable
 “ ‘opportunity of inspection.’ This is obviously to exclude
 “ the possibility of goods having their condition altered by
 “ lapse of time, and to call attention to the proximate relation-
 “ ship, which may be too remote where inspection even of the
 “ person using, certainly of an intermediate person, may

(1) 11 Q. B. D. 510.

(2) [1932] A. C. 582.

“reasonably be interposed.” Then he says later (1): “It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House. I would point out that, in the assumed state of the authorities, not only would the consumer have no remedy against the manufacturer, he would have none against any one else, for in the circumstances alleged there would be no evidence of negligence against any one other than the manufacturer; and, except in the case of a consumer who was also a purchaser, no contract and no warranty of fitness, and in the case of the purchase of a specific article under its patent or trade name, which might well be the case in the purchase of some articles of food or drink, no warranty protecting even the purchaser-consumer. There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleaning purposes, where the same liability must exist. The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless proprietary medicine, an ointment, a soap, a cleaning fluid or cleaning powder. I confine myself to articles of common household use, where every one, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser—namely, by members of his family and his servants, and in some cases his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.”

In referring in his opinion to the case of *Dominion Natural Gas Co., Ltd. v. Collins* (2), he said (3): “In the *Dominion Natural Gas Co., Ltd. v. Collins and Perkins*, the appellants had installed a gas apparatus and were supplying natural

(1) [1932] A. C. 582.

(3) [1932] A. C. 596.

(2) [1909] A. C. 640.

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" gas on the premises of a railway company. They had
" installed a regulator to control the pressure and their men
" negligently made an escape-valve discharge into the building
" instead of into the open air. The railway workmen—the
" plaintiffs—were injured by an explosion in the premises.
" The defendants were held liable. Lord Dunedin, in giving
" the judgment of the Judicial Committee (consisting of him-
" self, Lord Macnaghten, Lord Collins and Sir Arthur Wilson),
" after stating that there was no relation of contract between
" the plaintiffs and the defendants, proceeded: ' There may
" ' be, however, in the case of anyone performing an operation,
" ' or setting up and installing a machine, a relationship of
" ' duty. What that duty is will vary according to the
" ' subject-matter of the things involved. It has, however,
" ' again and again been held that in the case of articles
" ' dangerous in themselves, such as loaded firearms, poisons,
" ' explosives, and other things ejusdem generis, there is
" ' a peculiar duty to take precaution imposed upon those
" ' who send forth or install such articles when it is necessarily
" ' the case that other parties will come within their
" ' proximity '." Then Lord Atkin goes on: " This, with
" respect, exactly sums up the position. The duty may exist
" independently of contract. Whether it exists or not depends
" upon the subject-matter involved; but clearly in the class
" of things enumerated there is a special duty to take precau-
" tions. This is the very opposite of creating a special category
" in which alone the duty exists. I may add, though it
" obviously would make no difference in the creation of a duty,
" that the installation of an apparatus to be used for gas
" perhaps more closely resembles the manufacture of a gun
" than dealing with a loaded gun." That is how Lord Atkin
summed up the decision of the Privy Council in the *Dominion
Natural Gas Co., Ltd. v. Collins* (1).

The principle enunciated in *Donoghue v. Stevenson* (2) was
applied in *Brown v. Cotterill* (3), *Malfrout v. Noxal, Ltd.* (4)
and *Herschthal v. Stewart and Ardern, Ltd.* (5). In the latter
case, Tucker J., (as he then was), decided that that principle
applied not only to manufacturers but also to suppliers and
repairers of goods. On the other hand, Goddard L.J., (as
he then was), sitting as an additional judge of the King's

(1) [1909] A. C. 640.

(4) 51 T. L. R. 551.

(2) [1932] A. C. 562.

(5) [1940] 1 K. B. 155.

(3) 51 T. L. R. 21.

Bench Division, refused to apply such a principle in *Paine v. Colne Valley Electric Supply Co., Ltd.* (1), on the ground that there was no proximity of relationship between the manufacturers and the workman in that case so as to impose upon them the duty laid down in *Donoghue v. Stevenson* (2).

I was also referred to a case of *Haseldine v. C. A. Daw & Son, Ltd.* (3). The facts in that case were these. A gentleman named Charles Bennett Daw was landlord of a block of flats known as Hornton Court, Kensington, and, with other members of his family who owned other properties, he formed a company, C. A. Daw & Son, Ltd., of which he was a director and the secretary, to manage the properties. The landlord himself entered into the tenancy agreements for the flats and he remained the occupier of the common staircase and the lift, but he used the company as his agent to make all contracts and arrangements necessary for the running and the maintenance of the lift. Under that authority the company made a contract of insurance with the Law Accident Insurance Society against third-party risks in respect of the use of the lift, and also a contract with A. & P. Steven, Ltd., a firm of engineers, under which they undertook once a month to adjust, clean and lubricate the mechanism of the lift, to provide packing material for the glands and leather for the control valves, and to furnish signed reports after each periodical visit. The engineers duly examined, and in November, 1939, the engineers, replying to a complaint by C. A. Daw & Son, Ltd., that the lift was slow in descending, wrote a letter in which they said: "The rams of these hydraulic lifts are badly worn and scored. The diameter varies from place to place . . . All these lifts require to be fitted with new top and bottom rams, but we know that you are disinclined to face this expenditure under present conditions. We doubt if we could obtain the necessary bars and tubes. We have discussed this matter before and the better plan is to electrify the lifts which also is probably out of the question at the moment. We suggest that we send our men in twice a month, the extra visit per month being merely to grease the rams . . . We would manage to work this in for an additional charge of 10s. per month." The engineers never said or stated that the lift was in a dangerous condition and ought not to be used. A visitor,

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(1) 55 T. L. R. 181.

(3) [1941] 2 K. B. 343.

(2) [1932] A. C. 562.

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who was the managing clerk to a firm of solicitors, in the course of his professional duties went to Hornton Court to visit one of the tenants. On arriving at the flats the plaintiff was informed by the porter that the flat which he wanted was on the fifth floor. The porter was standing by the lift, the door of which was open, and he motioned to the plaintiff to enter the lift. The plaintiff did so. The porter also entered the lift, closed the gates and set the lift in motion. When the lift had ascended as far as the second floor, it stopped and then fell to the bottom of the well, the cause of its failure being the fracture of a gland. The plaintiff received injuries and brought his action against Messrs. C. A. Daw & Son, Ltd. and the engineers. It was held by the Court of Appeal, after a discussion as to whether the plaintiff was an invitee or licensee of the landlord, that "the only obligation on the landlord was to take care that the lift was reasonably safe, and that he had fulfilled that obligation by employing a competent firm of engineers to make periodical inspections of the lift, to adjust it and to report on it, and that, therefore, the landlord was not liable." Scott L.J. held "that the plaintiff was an invitee of the owner of the flats and that the expressions of opinion to the contrary effect in *Fairman v. Perpetual Investment Building Society* (1) were obiter dicta." It was held by Goddard L.J. that the Court was bound by that decision. Then it was held by Scott L.J. and Goddard L.J. (as he then was), Clauson L.J. dissenting, "that the repairer of an article owes a duty to any person by whom the article is lawfully used to see that it has been carefully repaired in a case where there is no reasonable opportunity for the examination of the article after the repair is completed and before it is used, and when the use of the article by persons other than the person with whom the repairer contracted must be contemplated or expected, and that, therefore, the plaintiff was entitled to recover from the engineers"; and in so finding the majority adopted the principle of *Donoghue v. Stevenson* (2) against the engineers. If the lift had been occupied by the tenant upon whom the visitor was calling, as part of the hereditament leased by the landlord, on the authorities to which I shall now have to refer the plaintiff could not possibly have recovered.

In passing, I should like to refer to the judgment of Goddard L.J. (as he then was) in that case, as, if I may venture

(1) [1923] A. C. 74.

(2) [1932] A. C. 562.

to say so, extremely helpful in considering what it really was that *Donoghue v. Stevenson* (1) decided. He refers to *Grant v. Australian Knitting Mills, Ltd.* (2) at page 377 of the report, and says: "Lord Wright disposed of the matter in a sentence: 'It was not contemplated that they should be first washed.' If, then, there was any doubt about the governing principle of *Donoghue v. Stevenson* (1), Lord Wright has dissipated it. The manufacturer was held liable, not because he was interested in his product being used as it left his factory, but because he had no reason to contemplate an examination by the retailer or ultimate buyer before use. Believing, as I do, that this is the governing principle, it follows that, in my opinion, *Dransfield v. British Insulated Cables, Ltd.* (3) was wrongly decided, although I do not propose to burden this judgment with a discussion of that case. On what sound principle, then, can the case of a repairer be distinguished from that of a maker of an article? Of course, the doctrine does not apply to the repair of any article any more than to its manufacture. If I order my tailor to make me a suit, or a watchmaker to repair my watch, no one would suppose that anyone but myself was going to use the suit or watch. If the tailor left a large needle in the lining and it injured a person to whom at some time I lent the coat, I should think that the latter could not recover against the tailor. The relationship would be altogether too remote, and many of the suggested difficulties of *Donoghue v. Stevenson* (1) disappear, if it is realized that the decision was, as I venture to believe, essentially one on the question of remoteness. But the case of a lift repairer is very different. A lift in a block of flats is there to be used by the owner and his servants, the tenants and their servants, and all persons resorting thereto on lawful business. Blocks of flats and offices are frequently owned by limited companies who would be contracting parties with the lift engineers. In such a case, the employer would be the one 'person' who could by no possibility use the lift. If the repairers do their work carelessly, or fail to report a danger of which they as experts ought to be aware, I cannot see why the principle of *Donoghue v. Stevenson* (1) should not apply to them." I do not propose to make this judgment one of undue length, but there follow in the judgment of Goddard L.J. on pages 378 and 379, some observations which, without

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(1) [1932] A.C. 562.

(2) [1936] A.C. 105.

(3) (1937) 54 T. L. R. 11.

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presumption, I may venture to say are extremely helpful.

So much for the argument of Mr. Maddocks with regard to *Donoghue v. Stevenson* (1), on which he sought to found his case. But there is, in my view, another principle under which, in my opinion, in the present state of the law, this case falls to be decided. Here the complaint is against the landlord of the house who let the house unfurnished to the tenant in a dangerous condition by reason of faulty gas installation which he had negligently caused to be put in. In *Robbins v. Jones* (2), Erle C.J. said (3): "A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any." This passage, said Lord Macnaghten, in the well-known case of *Cavalier v. Pope* (4) is beyond question the law.

That principle was relied upon by the Court of Appeal in *Bottomley v. Bannister* (5), which was decided by the Court of Appeal before the case of *Donoghue v. Stevenson* (1). In *Bottomley v. Bannister* (5), it was held by the Court of Appeal that "At common law in the absence of express contract a landlord of an unfurnished house is not liable to his tenant, nor is a vendor of real estate liable to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, even if the defects are due to his construction or are within his knowledge." The cases of *Robbins v. Jones* (2) and *Cavalier v. Pope* (4) were followed. The action was brought by the administrators of Mr. Bottomley and his wife, on behalf of Mr. Bottomley under his contract and on behalf of his wife in tort, consequent upon their death owing to an escape of gas in their bathroom. The action was tried before Hawke J., with a common jury. The judgment was reversed by the Court of Appeal and it was held, on the facts of that case and the findings of the jury, "that there was no evidence of a breach of any duty which the law cast upon the defendants as vendors or lessors of the house towards C.B. or his wife, and that the plaintiffs could not recover." There is an interesting comment on that case by the learned authors of Clerk and Lindsell (9th and last ed.), in which it is said, at page 502, "In *Bottomley v. Bannister* (5), a builder sold a house which was equipped with a gas boiler having

(1) [1932] A.C. 562.

(2) 15 C. B. (N. S.) 221.

(3) Ibid. 240.

(4) [1906] A. C. 428, 430.

(5) [1932] 1 K. B. 458.

" a special burner which, if properly regulated, required no
 " flue. The purchaser and his wife were killed by gas, owing
 " to the improper regulation of the burner. The builder was
 " held not liable on the grounds, (1.) that the installation was
 " part of the realty and no duty was owed in respect of it to
 " a purchaser, (2.) that the burner was regulated by the gas
 " company or the purchaser and not by the builder, and
 " (3.) that the builder did not know the apparatus was,
 " dangerous. Since the decision in *Donoghue v. Stevenson* (1)
 " the last ground of the decision can no longer be maintained,
 " if the builder ought to have known of the danger. It may
 " be doubted, indeed, if the first ground of the decision can be
 " maintained having regard to the fact that the apparatus was
 " designed to deal with such a dangerous thing as gas." The
 learned editors of this work seem to think that the case of
Bottomley v. Bannister (2), since the decision in *Donoghue v.*
Stevenson (1), ought to have been decided differently.

In *Otto v. Bolton & Norris* (3), Atkinson J., decided that :
 " A builder who builds a house for sale is under no duty
 " either to a future purchaser or to persons who come to live
 " in the house to take care that it is well constructed and
 " safe " ; and Atkinson J., followed *Bottomley v. Bannister* (2).
 It was held expressly that " The law as stated by Scrutton L.J.,
 " and Greer L.J., in *Bottomley v. Bannister* (2) . . . has not
 " been altered by the decision of the House of Lords in
 " *Donoghue v. Stevenson* (1). The principle laid down in
 " *Donoghue's* case is that there can be no duty cast upon the
 " vendor without proximate relationship, of which the main
 " test is whether there is reasonable opportunity for exam-
 " ination between the time of the sale or the doing of the
 " work and the use or consumption of the article by the
 " purchaser." Atkinson J., at the end of his judgment,
 says (4) : " In *Farr v. Butters Bros., & Co.* (5), decided by the
 " Court of Appeal since *Donoghue v. Stevenson* (1), Scrutton L.J.
 " extracts precisely this principle from the case. Dealing
 " with that case, he (Scrutton L.J.) said : ' There was thus no
 " ' opportunity of independent examination between the manu-
 " ' facturer and the consumer. That proximate relationship,
 " ' according to the three law lords who constituted the
 " ' majority, created the liability of the manufacturer '."
 " Then," Atkinson J., says, " following his quotation from Lord

(1) [1932] A. C. 562.

(4) Ibid. 57.

(2) [1932] 1 K. B. 458.

(5) [1932] 2 K. B. 606, 614, 615.

(3) [1936] 2 K. B. 46.

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"Thankerton (1) he (Scrutton L.J.) goes on: 'There, obviously, the liability is rested upon the fact that the manufacturer sends out the ginger-beer in such a condition that it cannot be inspected until it is consumed. The impossibility of intermediate examination makes the relation so proximate that there is a liability'." That is a quotation from Lord Thankerton. Then Atkinson J. adds: "Now even if this principle does apply to buildings which are sold by the man who has built them, it seems to me that it would still be impossible to hold that there was the necessary proximity between the defendants and Mrs. Otto. There was nothing to prevent examination of the house on the intermediate purchase. Indeed, the well known absence of any duty in respect of the sale of a house makes examination usual and likely. The defect was not hidden or latent; the blobs were there plainly to be seen and would have put anybody, making a proper inspection, on his guard. In fact, there was an examination, although an inadequate one, by the person who made a report on September 21 or 22 to Miss Otto's solicitors. I think the remarks of Greer L.J., in *Bottomley v. Bannister* (2) are absolutely relevant and are unqualified by anything said in *Donoghue v. Stevenson* (3). Therefore, although I say so with great regret, I am bound by the law as laid down in that case to hold that Mrs. Otto's claim fails."

As I read a passage in *Donoghue v. Stevenson* (3), in Lord Macmillan's opinion, I venture to think that that is exactly the view which Lord Macmillan expresses with regard to whether or not the principle of *Donoghue v. Stevenson* (3) is to be applied in cases of landlord and tenant or vendor and purchaser of houses. At page 609 he says: "I observe, in the first place, that there is no decision of this House upon the point at issue." The point at issue before their Lordships' House in *Donoghue v. Stevenson* (3) was whether "the manufacturer of an article of food, medicine or the like, sold by him to a distributor," in certain circumstances which I have already read, "is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health." That was the issue which was raised before the House of Lords. Bearing that in mind, Lord Macmillan says: "I observe, in the first place, that there is no decision of this House upon the point

(1) [1932] A. C. 602-3.

(3) [1932] A. C. 562.

(2) [1932] 1 K. B. 458.

" at issue, for I agree with Lord Hunter that such cases as "*Cavalier v. Pope* (1) and *Cameron v. Young* (2), which " decided that 'a stranger to a lease cannot found upon " 'a landlord's failure to fulfil obligations undertaken by " 'him under contract with his lessee,' are in a different chapter " of the law." Interpreting that to the best of my ability, I understand that Lord Macmillan is saying : There are cases in which there is no liability upon a vendor or an owner or lessor of a house to the purchaser or the lessee, but those belong to an entirely different branch of the law than the branch to which we have to give our attention in this case of *Donoghue v. Stevenson* (3).

If I may again refer to a text-book, Professor Winfield, in the third and last edition of his book on the Law of Tort, makes this comment generally, at s. 163, p. 543. He refers to the case of *Otto v. Bolton & Norris* (4), to which I have already referred, and he says : " In *Otto v. Bolton*, A sold to B " a newly-built house which was so negligently constructed " that the ceiling of one of the bedrooms fell upon and injured " B and C (the mother of B) who was staying in the house. " Both B and C sued A. B's claim was based upon breach " of contract and, as A had expressly assured B that the " house was well-built, A was held liable for a breach of " warranty to that effect. C's claim was for negligence, but " Atkinson J. held that A was not liable because there was " nothing in *Donoghue v. Stevenson* (3) which had qualified " the law about ruinous houses. That side of *Donoghue's* " case which referred to dangerous chattels was inapplicable, " for a house is not a chattel, and even if it were reckoned as " such, the plaintiff had had a reasonable opportunity of " examining it ; that side of it which referred to the scope of " duty in negligence was equally inapplicable because the " House of Lords in *Cavalier v. Pope* (1), decided many years " before *Donoghue's* case, had held that no legal duty existed " with respect to a ruinous house, and legal duty is an essential " of the tort of negligence. It is difficult to see how the learned " judge could have reached any other conclusion ; but the " law is not satisfactory on this point and it is quite likely " that if no one had ever sued in tort for injury arising from " a ruinous house until after Lord Atkin's definition of legal " duty in *Donoghue's* case, the defendant in *Otto v. Bolton* (4)

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(1) [1906] A. C. 428.

(3) [1932] A. C. 562.

(2) [1908] A. C. 176.

(4) [1936] 2 K. B. 46.

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" would have been held liable, for he would have been the
 " 'neighbour' of the plaintiff within the terms of that
 " definition. What conceivable difference is there between
 " carelessly putting in circulation a dead snail in a bottle of
 " ginger-beer and putting on the market a house so carelessly
 " built as to be likely to cause death or grave injury? The
 " exception which denied a remedy in the latter case had a
 " very questionable historical origin (1) and it gave such a charter
 " of immunity to the jerry-builder that the Housing Act,
 " 1925 (2) (re-enacted on this point by the Housing Act,
 " 1936 (3)) made a partial qualification of it in favour of the
 " tenant; but nothing except further legislation will confer
 " any similar remedy on a third person injured in this way."
 The last case to which I was referred was *Davis v. Foots* (4),
 again the case of an escape of gas. It was held that the
 " defendants were not liable to the plaintiff in damages,
 " as a landlord of an unfurnished house, in the absence
 " of an express contract, is not liable to the tenant for
 " defects in the house rendering it dangerous or unfit for
 " occupation, even if he has brought about the defect itself
 " or is aware of its existence." That is a decision of the
 Court of Appeal, on an appeal from a decision of my brother
 Wrottesley J., and the judgments were given by the late
 MacKinnon L.J., du Parc L.J. (as he then was) and Bennett J.
 Du Parc L.J., at page 124, deals with *Donoghue v.*
Stevenson (5) and with the decision of Atkinson J. in *Otto v.*
Bolton & Norris (6), and comes to the conclusion that the
 appeal should be allowed and says he cannot find any ground
 on which the judgment of the learned judge can be upheld.

In the present case there was undoubtedly ample opportunity of inspection. The geyser, with all its defects, was in the house when the tenant took it; and there was evidence that there was a smell of gas in the bathroom, as indeed there was in another house with a geyser of similar construction. Mr. Hutton, who appeared for the corporation, pressed the point of contributory negligence against the deceased man, but I am quite unable to find that any such negligence was proved. Mr. Maddocks, who has been, if I may say so, by his attractive argument, of the very greatest assistance to me in

(1) 52 Law Quarterly Review
 (1936) 313-15.
 (2) 15 Geo. 5. c. 14, s. 1.
 (3) 26 Geo. 5 & 1 Edw. 8, c. 51,

(4) [1940] 1 K. B. 116.
 (5) [1932] A. C. 562.
 (6) [1936] 2 K. B. 46.

this case, in his final speech to me receded somewhat from the position that he had no case against the contractors and invited me to overrule the case of *Buckner v. Ashby & Horner, Ltd.* (1) by which he felt himself bound. I can only remind him that as that decision is a decision of the Court of Appeal I am also bound by it and must follow it, even if I felt (which I do not) that it was wrongly decided. Mr. Maddocks also asked me to hold that for the purposes of this case the corporation should be considered not as landlords in order to get round the principles of the landlord and tenant cases but they should be looked upon, so to speak, as strangers who had negligently installed a dangerous thing in the house. But I think it is quite impossible, without doing violence to the admitted facts in this case, to treat the corporation in any other way than as the landlords of Mrs. Taylor, in whose house there was installed this dangerous gas installation. In the result, I am, with regret, in view of the sympathy which everyone, myself included, must feel for the plaintiff, bound to dismiss her action, and there must be judgment for the defendants.

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Judgment for both defendants.

Solicitors for plaintiff: *Preston, Lane-Claypon & Co. for William A. Leyson, Neath.*

Solicitors for corporation: *Armitage, Chapple & Co. for Madge, Lloyd and Gibson, Gloucester.*

Solicitors for construction company: *Tarry, Sherlock and King for Townsend, Calderwood and Story, Swindon.*

(1) [1941] K. B. 321.

C. G. M.

THE MINISTER OF WORKS AND PLANNING v.
HENDERSON AND OTHERS.

1946

Sept. 18.

 Wynn-Parry J.

Crown—Servant of—Minister of Works and Planning—Right to sue in capacity of Minister.

The Minister of Works and Planning, as the successor of the Commissioners of Public Works and Buildings, is entitled to sue, and is liable to be sued, in his capacity as Minister.

Graham and Others v. H.M. Commissioners of Public Works and Buildings [1901] 2 K. B. 781, applied.

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APPLICATION FOR AN INTERIM INJUNCTION.

The Minister of Health and Planning brought an action against the defendants, the chairman and three members of a committee of squatters who had entered into the occupation of premises known as the Duchess of Bedford House, Duchess of Bedford's Walk, Campden Hill, Kensington, in which he claimed, inter alia, an injunction restraining the defendants and each of them, and the agents and servants of them or any of them from entering, remaining, or otherwise trespassing on the premises in question. The plaintiff having applied in vacation for an interim injunction, objection was taken on behalf of the defendants that the Minister of Health and Planning was not competent to sue in his capacity as Minister and that the action should have been brought by the Attorney-General on behalf of the Crown. The detailed facts of the case are not material to this report. Evidence having been given in support of the acts of trespass alleged :

Aiken Watson K.C. and *I. H. Jacob* for the defendants. The present proceedings are not properly constituted since the Minister of Works has no power to sue in the action. No minister of the Crown may sue in his capacity as such minister unless he is authorized to do so by statute. In the present instance there is no statutory authority which authorizes the Minister of Works to sue in that name. In *Robertsons' Civil Proceedings by and against the Crown*, at p. 79, the author traces the history of the Commissioners of Works, the plaintiff's predecessors, down to 1908 and says "there is no general power "in any statute whereby the commissioners can sue or be sued, "though there are special provisions to that effect for the "purposes of particular Acts." The commissioners remained the effective body until the passing of the Minister of Works and Planning Act, 1942, which, in effect, transferred all the powers of the commissioners, and some of those of the Minister of Health, to the Minister of Works, but throughout the statute no authority is given to the Minister to sue or be sued in his corporate capacity. The present proceedings are misconceived and should have been brought by the Attorney-General on behalf of the Crown.

Colin Pearson for the plaintiff. The Minister of Works is entitled to act as plaintiff in the present proceedings. In *Graham and Others v. His Majesty's Commissioners of Public Works and Buildings* (1) it was held that an action would lie

(1) [1901] 2 K. B. 781, 791.

against the Commissioners, and it was also held by the court by necessary implication, and expressly by Phillimore J., that the right to sue was also included in the Minister's powers. By s. 5, sub-s. 1, of the Minister of Works and Planning Act, 1942, the Minister is declared for all purposes to be a corporation sole, and this conferred on him the ordinary attribute of being able to sue and of being liable to be sued. Moreover by s. 6, the "property rights and liabilities held enjoyed and incurred by "the Commissioners" are transferred to the Minister and this, on the decision in *Graham and Others v. His Majesty's Commissioners of Public Works and Buildings* (1) includes the right to sue and the liability to be sued. It is true that the decision in that case is stated by Robertson to be open to the gravest doubt but it has remained unchallenged since 1901 and it is submitted that it is good law.

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WYNN-PARRY J. stated the facts and said that on the evidence he had unhesitatingly come to the conclusion that the defendants and everyone else concerned with them had committed and continued to commit a trespass. Continuing, he said: Mr. Aiken Watson took a preliminary point to the effect that the Minister of Works was not competent to sue in his capacity as such Minister, and that the action should have been brought by the Crown through the Attorney-General. In support of that contention he referred me to certain passages on pp. 79 and 80 of Robertson's Civil Proceedings by and against the Crown with the view of satisfying me that the proposition he put forward was sound and was so plain that I ought to come to the conclusion at this stage of the proceedings that the plaintiff was incapable of suing and that I should, therefore, stop the proceedings in limine. The views of so eminent a jurist as the author of the work to which I was referred are, of course, entitled to every consideration and respect, but as against them, as was pointed out by Mr. Pearson on behalf of the plaintiff, is the circumstance that as long ago as 1901 in *Graham and Others v. His Majesty's Commissioners of Public Works and Buildings* (1) the predecessors of the present Minister, it was held by Ridley and Phillimore JJ. that an action would lie against those commissioners and Phillimore J. made this statement referring to them: "The mere fact of their being "incorporated without reservation, confers, it seems to me, the "privilege of suing and the liability to be sued." That is a

(1) [1901] 2 K. B. 781, 791.

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decision which has stood unchallenged in these courts since it was given. True, it is commented on adversely by Robertson in his work, but the statement made by Phillimore J., is one of general application and sitting here as a judge of first instance, I feel bound to follow the reasoning of that learned judge, which, indeed, commends itself to me. The matter does not end there, because in 1942, there came into force the Minister of Works and Planning Act of that year which was "an Act to make provision in connexion with the appointment of a Minister of Works and Planning" (and) "to provide for the transfer to that Minister of the functions and property of the Commissioners of Works . . ." Section 1, sub-s. 1, of the Act provides that "if His Majesty is pleased to appoint any person to be a Minister of the Crown by the name of Minister of Works and Planning, then, subject to and in accordance with the provisions of this Act, there shall be transferred to that Minister . . . (3.) all property, rights and liabilities held, enjoyed or incurred by the Commissioners of Works" Mr. Pearson submitted that the words "all . . . rights and liabilities" were apt to cover the right to sue and the liability to be sued. Further s. 6 of the Act refers to "any property, rights and liabilities held, enjoyed or incurred by the said Commissioners" as being transferred to the Minister. On the material to which I have referred, my conclusion is that his action is properly constituted and that the Minister of Works is entitled to pursue it. [His Lordship held that the case was one in which, in the exercise of his discretion he should grant an interim injunction in the terms claimed on the writ.]

Interim injunction granted.

Solicitor for the plaintiff : *Solicitor to the Minister of Works.*
Solicitors for the defendants : *Seifert, Sedley & Co.*

P. B. D.

COLMAN v. ISAAC CROFT & SONS AND ANOTHER.

1946

July 17, 18,
19, 31.

Personal injuries — Motor vehicle — Negligence — Master and servant — Common employment — Contract of service — Volunteer.

Hilbery J.

The plaintiff's husband, a bricklayer, entered the service of the first defendants to carry out building operations and repairs to their garage and premises. On occasions when there was no regular driver's mate available he was asked by his employers, who were haulage contractors and furniture removers, to accompany the driver of one of their lorries to help in the loading and unloading of the vehicle, and he agreed to do so. On one such occasion, owing to the admitted negligence of the driver, Armitage, the second defendant, the lorry crashed into the rear of a stationary and properly illuminated vehicle, and the plaintiff's husband was killed. The plaintiff claimed damages under the Fatal Accidents Acts. The defendant employers pleaded the defence of common employment :—

Held, that the doctrine of common employment was not applicable to the case, because at the time of the accident there was no actual contract of employment covering the work which was being done by the deceased man, who was no more than a passenger in the lorry ; and that even if he had undertaken the risks of the negligence of the driver when both he and the driver were engaged in the common task of loading or unloading the lorry, he had not undertaken the risks of the driver's negligence while being driven from one place to another.

Pollock v. Charles Burt, Ltd. [1941] 1 K. B. 121 applied ;

Decision in *Degg v. Midland Ry. Co.* ((1857) 1 H. & N. 773) not followed.

ACTION tried by Hilbery J.

On January 1, 1943, Frank Colman, the husband of the plaintiff, Mrs. May Stott Colman, was killed while travelling in a motor lorry owned by the first defendants, Isaac Croft & Sons, which was being driven by the second defendant, William Armitage, an employee of the first defendants. Some six months earlier Colman, a bricklayer by trade, had entered the employ of Isaac Croft & Sons, who were haulage contractors and furniture removers, to carry out building operations and repairs to their garage and premises, but on several occasions, when there was no building work to be done, he was asked by his employers to accompany the drivers of their lorries and help them in the loading and unloading of the vehicles. On one such occasion, owing to the admitted negligence of the driver, Armitage, the second defendant in the action, the lorry crashed into the back of a stationary and properly illuminated vehicle and Colman was

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killed. The plaintiff claimed damages against both the owners of the lorry and the driver under the Fatal Accidents Acts. Alternatively she pleaded that the defendant-owners had been guilty of a breach of their statutory duty under the Road Traffic Acts by causing or permitting a person of no substance to drive the lorry without covering by insurance his liability to third parties. The defendants denied the allegation of breach of statutory duty under the Road Traffic Acts and relied on the defence of common employment.

Having regard to the decision of the learned judge the case is only reported on the question of common employment.

Beney K.C. and *Dare* for plaintiff. The defence of common employment is not available here for the first defendants. The deceased man, Frank Colman, was by trade a bricklayer and by his contract with the first defendants he was engaged to effect alterations and repairs to their garage and premises. The evidence was that in the course of six months' employment, he went out with a removal lorry, in all, on three occasions, on the last of which he met his death. On each occasion he went out with the lorry as a volunteer. If he had been directed by the first defendants to go out with the lorry he could have refused, on the ground that there was no contractual obligation on him to do so. In *Pollock v. Charles Burt, Ltd.* (1) where the plaintiff, a branch manager of the defendant company, volunteered to do mail order work, *du Parc L.J.*, distinguished the facts in *Degg v. The Midland Ry. Co.* (2) from those in *Pollock's* case, saying (3) "there is all the difference in the world between the case of two men working at a turntable or two persons, as I suggested in the course of the argument, engaged with others at haymaking, where the labour is obviously common labour with a common object, and the case of a man who has a particular piece of work which he wishes to do and is being driven in a car by some person who has no concern with that particular work at all." There is nothing in principle to distinguish the present case from that of *Pollock v. Charles Burt, Ltd.* (1).

Willink K.C., *Sir Valentine Holmes K.C.* and *Milmo* for first defendants. Frank Colman, the deceased man, and *Armitage*, the second defendants were in the common employment of the first defendants. They were employed in common work,

(1) [1941] 1 K. B. 121.

(3) [1941] 1 K. B. 132.

(2) (1857) 1 H. & N. 773.

i.e., work which naturally, or in the normal course, involved their juxtaposition, local or casual, and exposure to the risk of negligence of one affecting the other. See Lord Wright's observations in *Radcliffe v. Ribble Motor Services, Ltd.* (1). The deceased was on the lorry in pursuance of a contract of employment with the first defendants, when he was asked to go out on the lorry and agreed to do so: he was not a volunteer. As Lord Macmillan said in *Radcliffe v. Ribble Motor Services, Ltd.* (2): "In the ordinary case of common employment, "the nature of the employment is such as to bring the employees "into association with each other in carrying on some activity "in common and it is from this association that there arises "the risk that one of those so engaged may be injured by the "negligence of another also so engaged." If a chauffeur is asked to assist a gardener in bedding out plants and agrees to do so, the two men would be engaged in a common work and the doctrine would apply. In the present case the two men were employed by the same employers and were engaged on a common task, that of haulage or furniture removal. The ratio decidendi in *Pollock v. Charles Burt, Ltd.* (3) was stated by MacKinnon L.J., when he said (4) that the two men concerned in that case were not engaged in the same common work, nor were they fellow labourers in the same work; the one was acting as a branch manager and, on this occasion, on mail order work, the other was driving a motor car of the employers carrying one of their employees from one point to another. The observations of du Parc L.J., on which the plaintiff relies, were obiter. What is material is not the work *for* which the two men were employed, but the work *on* which they were employed. See also *Alexander v. Tredegar Iron & Coal Co., Ltd.* (5) and *McGovern v. London Midland & Scottish Ry. Co.* (6). Colman was not a volunteer, but, if he were, the doctrine of common employment applied to him: *Degg v. The Midland Ry. Co.* (7).

Beney K.C. in reply. The decision in *Degg v. The Midland Ry. Co.* (7) is no longer law, in view of what was said by the Law Lords in *Radcliffe v. Ribble Motor Services, Ltd.* (8). In any case, all that the deceased man volunteered for was to help the driver, if he needed help, in loading and unloading the

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(1) [1939] A. C. 215, 249.

(2) Ibid. 235.

(3) [1941] 1 K. B. 121.

(4) Ibid. 128-9.

(5) [1944] K. B. 390.

(6) [1944] 1 All E. R. 730.

(7) 1 H. & N. 773.

(8) [1939] A. C. 215.

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lorry. At the time of the injury to him, the deceased man was merely a passenger on the lorry and in no way volunteered to take the risks involved by being driven by the defendants' driver: *Pollock v. Charles Burt, Ltd.* (1). He was, at the time of the transit, not engaged in any work under his contract with the first defendants or, indeed, in any work at all.

Cur. adv. vult.

Before judgment was given, the plaintiff asked and was granted leave to withdraw the action against Armitage on the ground that judgment against that defendant might prejudice a claim by the plaintiff against the first defendants under the Workmen's Compensation Acts should such a claim be necessary.

July 31. HILBERY J. The plaintiff is the widow and administratrix of one Frank Colman deceased, and, as such, sues to recover damages under Lord Campbell's Act, alleging that her late husband's death occurred as the result of the negligence of one Armitage, a servant of the defendant company, and that the defendants, Isaac Croft & Sons, are vicariously responsible in law. Both the defendants admit that the deceased met with his death through the negligent act of the defendant Armitage. So far as Armitage is concerned, there is no answer to the claim. The defendants, Isaac Croft & Sons, have, however, set up in bar of the claim the plea that the admitted negligence of Armitage which caused the death of the plaintiff's late husband was the negligence of a servant in a common employment with the deceased man, and that on the occasion when he received the injuries from which he died, the deceased man and Armitage were engaged in work in the course of that employment in such circumstances that the claim is barred by what is usually termed the doctrine of common employment. The plaintiff denies that the doctrine is applicable in the particular circumstances of the case, but, in the alternative, asserts that if it is, then, inasmuch as the defendants' policy of insurance under the Road Traffic Act did not cover the personal liability of Armitage to a third party, the defendants were guilty of a breach of the statutory duty to insure, imposed upon them by the Road Traffic Act, and that the plaintiff is entitled to recover against them, as damages for breach of this statutory duty, the amount of damages awarded against Armitage, and

(1) [1941] 1 K. B. 121.

irrecoverable from him because he was not so covered by insurance by these defendants. The defendants answer that they were insured at the time in respect of Armitage's driving, that their insurance complied with the requirements of the Road Traffic Act, 1930, and that they were not guilty of any breach of duty imposed on them by that statute. Furthermore, they reserve and keep open, though they cannot, of course, argue before me, the contention that *Monk v. Warby* (1), was wrongly decided, and that the plaintiff has not any cause of action in law whereby such damages are recoverable for the alleged breach of statutory duty. All parties agree that the plaintiff's damages amount to 1,548*l.* 5*s.* 0*d.*

[His Lordship stated the facts of the deceased man's employment, and continued :] The first question, therefore, which has to be answered is whether the plaintiff's claim is barred in law by the doctrine of common employment. If the right conclusion is that it is not so barred, then the second point does not arise for decision. By the term "doctrine of common employment," is meant, to borrow the words of Blackburn J. in *Morgan v. Vale of Meath Ry. Co.* (2) : "that principle I take to be that a servant who engages for the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services." The principle is now affixed as an implication of law to the contract of service between a man and his master. (See per Goddard L.J. in *Alexander v. Tredegar Coal & Iron Co., Ltd.* (3).) But to make the principle applicable, so as to bar a servant from his remedy in damages against his master as vicariously responsible for the negligent act of another of his servants, not only must it be shown that the negligence complained of was that of a fellow servant in a common employment with the injured man by the same master, but it must be shown that at the time of the negligent act complained of, both servants were engaged in a common task for the same master. (See *Radcliffe v. Ribble Motor Services, Ltd.* (4).) "But," said Lord Wright in that case (5) : "the limitations which I have explained and which for purposes of this opinion I wish to emphasize are based on the fundamental principle that there must be an actual contract between the employer and

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(1) [1935] 1 K. B. 75.

(2) (1864) 5 B. & S. 570, 578.

(3) [1944] K. B. 390.

(4) [1939] A. C. 215.

(5) Ibid. 247.

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“ employee so that it may be possible from the nature and circumstances of that contract to imply, though by a fiction of law, that the employee undertook the particular risks of the negligence of his fellow employees. On this footing it has been held that where there was no contract at all, as in the case of a workhouse inmate doing work which he was ordered to do (*Tozeland v. West Ham Union*) (1), or a pilot employed under compulsion of law (*Smith v. Steele*) (2), there is no basis of actual contract on which to found the implied term. Blackburn J. in delivering judgment in the latter case referred to *Indermaur v. Dames* (3), as a case in which the law could not imply the term. The decisions which have held that a volunteer may be met by the defence of common employment have not come before this House. If they are right, they can only be considered as special exceptions to the settled general rule that the basis of common employment is a contract, as Blackburn J. specifically said in *Smith v. Steele* ” (2).

In the present case it is true that there was a contract of employment under which the deceased man had worked for the first defendants, and been employed by them for six months before his death. To that contract of employment, therefore, the principle was affixed by the law. That was a contract for work as a bricklayer, and for work in the nature of building alterations and repairs, a totally different class and type of work from that of a lorry driver's mate. When, on each of the occasions I have mentioned, the deceased man went to oblige the first defendants, his employers, to act as assistant to the lorry driver, he did not do so pursuant to his contract of employment at all. There was nothing in his contract of employment which gave his employers any right to order him to do such work. They did not in fact attempt to give such an order, nor was it suggested before me that they had any right so to do. The deceased man undoubtedly could lawfully have refused to go. When he did go, he went as a volunteer. Unless, therefore, the mere fact of his voluntarily acting in this extraordinary capacity gave rise to an implied new contract of service, to which the principle in question then became affixed by law, the principle had no application to the circumstances in which the deceased man met his death. In my view, there is no such implication of a fresh contract properly to be made. There was existing between the first defendants and the deceased

(1) [1906] 1 K. B. 538.

(3) (1867) L. R. 2 C. P. 311.

(2) (1875) L. R. 10 Q. B. 125.

man, and current all the time, the contract of employment for a particular type of work which I have already described. The mere volunteering by the deceased on one occasion or three, to do a piece of work for his employer, different from anything he was employed to do, does not seem to me either reasonably or necessarily to lead to the inference that the parties intended to abrogate the existing contract between them, or to make a new contract for a different type or piece of work. On the evidence it has not been suggested that the deceased man's rate of pay did not remain what it had been under his contract of service, that is to say, the rate applicable to a bricklayer or builder's operative, not that applicable to the mate of a lorry driver. There is no evidence before me that the deceased man undertook this special and exceptional work as a matter of contract at all. In my view, therefore, the principle of common employment is not applicable because there was no actual contract of employment covering the work which was being done at the time when the deceased met his death.

I am not unaware that there is some difficulty in deciding this case on the grounds I have given created by the decision in *Degg v. Midland Ry. Co.* (1). It will be remembered that in that case one James Degg was helping the servants of a railway company, in the turning and removal from one place to another on a railway of a railway truck, when certain regular servants of the railway company negligently, as it was said, drove some other trucks against the truck James Degg was helping with, and thereby killed him. James Degg was not a servant of the railway company, and had only voluntarily helped to move the truck. In the course of giving the judgment of the Court of Exchequer Bramwell B. said (2): "We were pressed by an expression to be found in those cases to the effect that 'a servant undertakes as between himself and his master to run all ordinary risks of the service, including the negligence of a fellow servant': *Wiggett v. Fox* (3), and it was said there was no such undertaking here. But in truth there is as much in the one case as in the other; the consideration may not be as obvious, but it is as competent for a man to agree and as reasonable to hold that he does agree that if allowed to assist in the work, though not paid, he will take care of himself from the negligence of his fellow-workmen, as it would be if he were paid for his services."

(1) 1 H. & N. 773.

(3) 11 Exch. 832.

(2) Ibid. p. 780.

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That decision is binding on me, and it has stood since 1857, but, with the greatest respect, I venture to doubt whether it would be so decided to-day in the light of what the House of Lords has now said in *Radcliffe's* case (1) from which I have already quoted, and of the authoritative statements we now have defining the legal principles governing the implication by the courts of terms in contracts. In *Pollock v. Charles Burt, Ltd.* (2), the plaintiff, a branch manager, volunteered, as no one else was available, to do a part of the work of the branch, known as the mail order work, which involved calling upon persons who had made inquiries by post with a view to obtaining their custom. The work was usually done by another employee who used his own motor car and drove himself. As this man was ill, neither he nor his motor car was available, and when the plaintiff volunteered he asked the defendants, his employers, to provide a motor car to take him to call upon these inquirers, and the defendants sent a car, the property of the defendants, but generally used in their business for the carriage of one or other of the directors. They sent with it the chauffeur who regularly drove it, to drive the plaintiff on this occasion. The work of calling upon these inquirers with a view to turning them into customers of the defendants entailed travelling long distances, and it was necessary to do it by road, if the calls were to be made within a reasonable limit of time. The plaintiff was injured while being driven to make these calls by the negligent driving of the chauffeur, whose ordinary work was, as I have said, to drive one of the directors of the defendant company. I took the view in that case that, though the branch manager might be said to be doing something outside his contract of service which he was not compellable to do, and might be regarded as a volunteer, yet he and the chauffeur, when driving from one address to another, calling upon persons with a view to obtaining their custom for the common employer of both of them, were engaged in the common task of soliciting this custom for the common master, though one performed one essential part of the task, which was interviewing each person, and the second performed the other essential part of the task, which was carrying the one who had to make the actual calls. The Court of Appeal, however, held that this view was wrong. *du Parc* L.J. (as he then was) held that what was decided in *Degg's* case was a long way from saying that, when a man, who is not obliged to do some work, and is not obliged to go in

(1) [1939] A. C. 215.

(2) [1941] 1 K. B. 121.

a car, offers to do it, and is given a lift in the car of the person for whose benefit he is doing the work, he and the driver of the car are then engaged in a common employment (1). "It seems to me," said the lord justice, "that there is all the difference in the world between the case of two men working at a turntable or two persons, as I suggested in the course of the argument, engaged with others at hay-making, where the labour is obviously common labour, with a common object, and the case of a man who has a particular piece of work which he wishes to do, and is being driven in a car by some person who has no concern with that particular work at all, but is concerned only to carry the person doing the work from one point to another for a purpose which does not concern the driver in the least, and with which he need not be acquainted." There it seems to me the learned lord justice is saying that it is wrong to take the view that the two men were engaged in the common task of calling on the customers, each performing a necessary but different part of the work which that common task involved, and is saying that each was engaged at the time in a different piece of work, the one in the work of driving, the other in the work of calling upon and interviewing the prospective customers.

If it is not misinterpreting this decision, then I think in the present case it is possible to take the view, though I am not blind to the arguments against it, that all that the deceased man volunteered for in the present case was to help the driver, when the driver needed help, with the loading and unloading of the lorry, and that when he was being carried in the lorry he was no more than a passenger. To-day the court leans against the doctrine of common employment, and it is possible to take the view that the deceased man volunteered to help with the loading and unloading of the lorry, and undertook the risks of the negligence of the lorry driver when both were engaged in doing this, but that he did not volunteer to undertake the risks of the negligence of the lorry driver while driving him from one place to another at which loading or unloading was to be done, any more than the branch manager in *Pollock v. Charles Burt, Ltd.* (2), undertook the risk of the negligent driving of the chauffeur, driving him from one place to another to make his calls. From the view I have, with some doubts, finally formed on the first point, it follows that the defence of Isaac Croft & Sons fails, and the plaintiff does not need to rely on her

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(1) [1941] 1 K. B. 132. (2) Ibid. 121.

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contention based on the Road Traffic Act, and the decision in *Monk v. Warby* (1). Having regard to the careful arguments upon this point by counsel on both side, I have hesitated over the question whether or not I should express my opinion on the point. On the whole, I think it better not to do so. I should not be deciding the point, and whatever views I expressed would not be binding on anybody. They would be no more than observations by the way. They might merely increase the volume of some law report without adding to its value.

The plaintiff now asks to withdraw the action against Armitage, and no longer asks for any judgment against him. At the plaintiff's instance I therefore allow the record to be withdrawn against Armitage. There must be judgment for the plaintiff against the defendants, Isaac Croft & Sons, for 1,548*l.* 5*s.* and costs.

Solicitor for plaintiff: *W. H. Thompson.*

Solicitor for defendant, Croft & Sons: *Stanley & Co.*

(1) [1935] 1 K. B. 75.

A. W. G.

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May 16, 24.
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COUTTS & COMPANY v. BROWNE-LECKY AND OTHERS.

Banking — Guarantee — Infant's overdraft — Liability of Guarantor.

A loan, by way of overdraft, made by a bank to an infant being void under s. 1 of the Infants Relief Act, 1874, the guarantors of the loan, where the fact of the infancy is known to all parties, cannot be made liable in an action on the guarantee.

Swan v. Bank of Scotland (1836) 10 Bligh N. S. 627, followed.

Decision of Pickford J. in *Wauthier v. Wilson* (1911) 27 T. L. R. 582, not followed.

ACTION tried by Oliver J.

The plaintiffs, Coutts & Company, bankers, permitted the first defendant, one of their customers, an infant, to overdraw his account. The overdraft was guaranteed by the second and third defendants, both of whom were of age. The bank knew of the first defendant's infancy.

The infant's contract to repay the loan being void by virtue of s. 1 of the Infants Relief Act, 1874, the guarantors resisted the bank's claim under the guarantees on the ground that they

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

could not be made liable as guarantors of a debt rendered void by statute. The bank therefore brought this action.

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Robert Mathew for the bank. There are exceptions to the rule that a guarantee of a void debt is not binding on the guarantor. There is no decision on the actual point at issue. That guarantors are liable in law as well as morally liable is consistent with the principle that incapacity of an infant operates only so far as is necessary for his protection. The guarantors, in a case like this, are not, it is submitted, entitled to the benefit of that protection. Since *Swan v. Bank of Scotland* (1), a Scottish case in the House of Lords, there have been a number of English decisions clearly establishing exceptions to the proposition there laid down. Those decisions culminated in *Garrard v. James* (2). In *Yorkshire Railway Wagon Co. v. Maclure* (3) loans were made to a company which it was ultra vires the company to accept, yet the directors of the company who guaranteed the loans were made liable as guarantors. The difference between those cases and *Swan v. Bank of Scotland* (1) is that in the latter case the contracts in question constituted a breach of the law, whereas in the two other cases above cited they were merely made void. It is not unlawful to lend money to an infant. The contract to repay is merely made void by the Act of 1874.

Among the cases establishing exceptions to the rule in *Swan v. Bank of Scotland* (1) is *Wauthier v. Wilson* (4), in which the facts were similar to those of this case. The decision of Pickford J. was upheld by the Court of Appeal (5) on different grounds, for they held that the contract in question was one of indemnity and not of guarantee. They did not deal with Pickford J.'s decision on the point at issue here, so that that decision stands. [Oliver J. They did not say that Pickford J.'s reasoning was right. That seems to show that they thought it wrong.] The fact remains that they never said that it was wrong, but merely left the point alone. In any event, the bank's form of guarantee signed by the two guarantors is a contract of indemnity under which they are liable.

Ashe Lincoln for the guarantors. A guarantee of a void contract must itself be void: see Pothier, as quoted in De Colyar's Law of Guarantees 3rd ed. (p. 210). *Swan v. Bank of*

(1) (1836) 10 Bligh N. S. 627.

(4) (1911) 27 T. L. R. 582.

(2) [1925] Ch. 616.

(5) (1912) 28 T. L. R. 239.

(3) (1881) 19 Ch. D. 478

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Scotland (1), a decision of the House of Lords in a Scottish case, is directly in point. There an overdraft was obtained on transactions which were declared void by the Stamp Act then in force. A guarantee of that overdraft was held void. *Yorkshire Railway Wagon Co. v. Maclure* (2) and *Garrard v. James* (3) are to be distinguished. Each is concerned with a guarantee of the performance of the company's contract which was ultra vires, the guarantors being the directors of the company. This line of cases is referred to in *De Colyar* as an exception to the general rule, and should be so treated. The reason for the exception is not clear from the decisions, but it might be attributed to the fact that the guarantors were directors of the company, so that they might be taken to warrant the company's powers. Thus, if in fact the company had not the power to make the contract, a guarantee by the directors might be regarded as a form of indemnity, on which they could be made liable.

Cur. adv. vult.

May 24. OLIVER J. None of the facts is in dispute, it being conceded by counsel for the bank that the first defendant was at all material times an infant. The clear-cut question of law arises: can the guarantor of an infant's overdraft with a bank be made liable to pay the bank? There is no question in this case of any bad faith.

Apart from authority, it would certainly seem strange if a contract to make good the debt, default or miscarriage of another—which is the classic definition of a guarantee—could be binding where, by statute (in this case the Infants Relief Act, 1874) the loan guaranteed is, in terms, made absolutely void. Looking at the matter broadly, how, in those circumstances, can the omission by an infant to pay what is made void by statute be described as either a debt, a default or a miscarriage? There is no debt here, for the Act of 1874 says so; there is no default, for the infant is entitled to omit to pay; and there is no miscarriage for the same reason.

Considering how often such a position might be expected to have arisen in the past, it is somewhat surprising to find such a dearth of authority. Mr. Ashe Lincoln, for the guarantors, relied on the Scottish case, *Swan v. Bank of Scotland* (1),

(1) 10 Bligh. N. S. 627.

(3) [1925] Ch. 616.

(2) 19 Ch. D. 478.

decided in the House of Lords. The law for the present purpose is the same in England and Scotland. The head-note is as follows: "M. with S. and others were joint obligors in a bond conditioned to answer for any balance which might become due from M. to a bank in Scotland, with whom he had obtained a credit according to the Scotch system of banking. M., in the course of his dealings, drew upon the bank by written orders for sums made payable to bearer, and issued at a place more than ten miles distant from the bank; but dated (contrary to the fact) at a place within that distance, and also post-dated; being in both respects contrary to the statute 55 Geo. 3, c. 184, s. 13, which not only imposes a penalty upon the parties to such drafts, but makes the transaction void. The mode of drawing was known by the bankers. M. having overdrawn the bank to the amount of 4,378*l.*; an action upon the bond was brought against S. by the bank, to recover the amount. Held that no debt had been incurred, and therefore that the parties were not liable upon the bond."

The overdraft there was guaranteed by joint guarantors and arose out of transactions which were both illegal, that is to say punishable, and expressly made void by statute. The only difference between those facts and the facts of this case is that there is no illegality about the present transaction. It is not illegal to allow an infant an overdraft: it is merely rather unbusinesslike if repayment is desired.

Lord Brougham in his opinion said (1): "There seems no reason at all to doubt that if, for the purpose of protecting the revenue, anything is forbidden to be done under a penalty, this does not necessarily make void the thing done, or prevent a right of action from arising out of it: thus, if dealing in tobacco without a licence, as in *Johnson v. Hudson* (2) is prohibited under a penalty, this will not prevent the person who so deals from maintaining an action for goods sold and delivered in such dealing, although the unlicensed dealer will be liable to the statutory penalty. But how would it have been if the legislature had, besides the penalty, provided that all dealing of the forbidden kind should be absolutely void? It is clear that, in this case, no action could arise from such void dealing, not because the law forbade the transaction for revenue purposes, but because it deprived the transaction of all legal force and

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(1) 10 Bligh N. S. 632, 633.

(2) (1809) 11 East 180.

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"effect by making it void; and even if it had only been forbidden, with or without penalty, provided the prohibition was for other than revenue purposes, no action could arise." It is important to notice that Lord Brougham was basing his opinion, not on the illegality of the transaction, but on the fact that the statute had made it void in terms. He then goes on (1) to review the provisions of the statute in question and continues (2): "But there follows a clear declaration of nullity or avoidance, for it goes on to provide that 'moreover,' that is, over and above forfeiting the penalty, the banker or other person shall 'not be allowed the money so paid, or any other part thereof, in account against the person or persons by or from whom such bill, draft, or order, shall be drawn, or his, her, or their executors or administrators . . .'" That seems to me a somewhat odd and cumbrous way of saying that the transaction is absolutely void, which is what the Infants Relief Act, 1874, provides in simple terms.

Lord Brougham, who had been dealing with general principles, then returns to the particular case (2): "Now what is the ground of the bank's action?—It is the debt alleged to be due from him to the bank, in respect of his drafts upon the bank agent, honoured by him at Dumfries. But if no debt is due, if the wrongdoer is forbidden from having any claims against his customer in account, there is no liability incurred by the co-obligors, or indeed by W. Martin himself. That is the immediate and direct consequence of the statutory provision." I may mention that in this present matter the bank originally sued the infant, and that they had to discontinue those proceedings. The debt has been abandoned—as of course it had to be—as against the principal. Lord Brougham continues (2): "It is as if the statute had made void the bond to secure the balance from time to time due; for if there is nothing due, no balance, the obligation to make that nothing good amounts itself to nothing." Then he goes on to discuss the operation of banking in Scotland.

That seems to me, as it stands, to be clear authority for the proposition put forward for the guarantors, namely, that the guarantors in this case cannot be successfully sued in respect of this alleged debt which is no debt at all.

(1) 10 Bligh N. S. 634.

(2) Ibid. 636.

It was argued for the bank that later cases had established an exception, into which the present case falls. Examples cited were *Yorkshire Railway Wagon Co. v. Maclure* (1), a decision of Kay J., and *Garrard v. James* (2), a decision of Lawrence J. Those cases and others there cited all concerned guarantees by the directors of companies of loans to their companies which it was ultra vires the companies to accept. In a number of the cases the directors were held liable notwithstanding that the companies could not be sued because the loans were ultra vires. I note in passing that in *Garrard v. James* (3) Lawrence J. appears to distinguish *Swan v. Bank of Scotland* (4) on the ground that in that case what was done amounted to a breach of the law as well as being void, and suggests that that was the reason for the decision. I find it difficult to follow that, because, it seems to me, Lord Brougham expressly says that that is not the reason for his decision: the real reason was that the statute had made the transaction void.

For a reason which I will give later, I do not think that these cases can apply to this one. My attention was also drawn by counsel for the bank to the fairly recent case of *Wauthier v. Wilson* (5). That, at first sight, appeared to be an authority on the very facts before me, and directly contrary to the sense in which I am giving judgment. The person sued there was a father who had guaranteed money advanced to his son, and guaranteed it on a promissory note with the son. Pickford J. found as a fact that all parties knew that the son was an infant, so that no questions arose on that point in the case, and said: "According to the Infants Relief Act, the transaction of loan to the son was void, and what has been argued is that the transaction of loan being void, the contract of guarantee must be void also, because you cannot have a guarantee of a debt which is void and consequently no debt." That is exactly the argument before me. Pickford J. goes on (6): "My difficulty is this. As I understand the case cited to me of the *Yorkshire Railway Wagon Co. v. Maclure* (1) Kay J. there expressly decided that there may be a transaction purporting to be a debt, which is void, and yet a guarantee given of that so-called debt may be valid. In that case a company called the Cornwall Minerals Railway

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(1) 19 Ch. D. 478.

(2) [1925] Ch. 616.

(3) Ibid. 616, 625.

(4) 10 Bligh N. S. 627.

(5) 27 T. L. R. 582.

(6) Ibid. 583.

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“ Company wished to borrow a sum of money, and they
 “ borrowed it under the guise of a contract of hire of their
 “ rolling stock, but Kay J. held that, although it was done
 “ under that guise, it was a transaction of borrowing. The
 “ directors of the company gave guarantees for the debt.
 “ They said the guarantees were given in respect of the rent
 “ for the wagons, but it was really the debt and interest which
 “ was guaranteed. First it was argued that the company
 “ were liable, and that if they were not the directors were
 “ liable upon their guarantees. Kay J. held that the company
 “ was not liable and that the transaction so far as it was
 “ concerned was ultra vires and void altogether. But he
 “ held on the authority of *Chambers v. Manchester and Milford*
 “ *Ry. Co.* (1) that the guarantee was good. He therefore
 “ held in so many words that the guarantee of what purported
 “ to be a debt, but which was not a debt because the person
 “ borrowing had no power to borrow, was a good guarantee.
 “ I cannot distinguish that case from this one. There may be
 “ differences, but I cannot see them.” He goes on then to
 give judgment on that footing against the guarantor. It is
 significant that *Swan v. Bank of Scotland* (2) does not seem to
 have been cited to the judge.

That decision went to appeal (3), and to my mind it is plain
 that the Court of Appeal supported Pickford J.'s decision on
 entirely different grounds, and did not agree with the grounds
 for his decision. The Court of Appeal held that the action was
 a common-law action on a promissory note, and that anyone
 executing a promissory note was liable on it at common law
 and could only escape liability on the arising of some equity
 which made it inequitable for him to pay. There were no
 equities here, said Farwell L.J., everybody knew all the facts,
 and “ to argue that that could give rise to an equity seemed
 “ to him to be a gross libel on equity.” The court held that,
 on the plain facts before them, the father had executed not
 a guarantee but an indemnity, and was personally liable
 without any question of a guarantee arising. I think it fairly
 plain that the court would not have supported Pickford J.'s
 decision had the contract in question turned out to be in reality
 a contract of guarantee and not one of indemnity. That seems
 apparent from the opening observation of Farwell L.J. (3),
 that “ This was an appeal from a judgment of Pickford J.,

(1) (1864) 5 B. & S. 588.

(3) (1912) 28 T. L. R. 239.

(2) 10 Bligh N. S. 627.

"and he should have been sorry if the court had felt itself bound to reverse that judgment." That was a very delicate and well earned compliment to a very great judge, but there it is. The implication was that if the court had not come to the conclusion that the contract was an indemnity and not a guarantee they would have had to reverse even Pickford J. Warrington J. said (1): "If the contract of the father was a contract of guarantee it was a contract to guarantee a debt which was no contract at all." That was a plain indication that if the contract had been one of guarantee the guarantor could not have been held liable.

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It may be that the voidness of a contract to guarantee the debt of a company acting ultra vires is different in its consequences from the voidness brought about by the express and emphatic language of a statute, although, along with Pickford J., I cannot understand or express what the difference is. Some day, perhaps, these cases, most of which are at nisi prius, will come up for review. I think that the definition given by Pothier and quoted in de Colyar's Law of Guarantees and of Principal and Surety 3rd ed., published as long ago as 1897, puts the matter in very precise language. In Pothier on contracts, quoted in that textbook (at p. 210), it is stated: "As the obligation of sureties is according to our definition an obligation accessory to that of a principal debtor, it follows that it is of the essence of the obligation that there should be a valid obligation of a principal debtor; consequently, if the principal is not obliged, neither is the surety, as there can be no accessory without a principal obligation However, where directors guarantee the performance of a contract by their company which does not bind the latter, as being ultra vires, the directors' suretyship liability is enforceable." I should have been grateful to the author if he had ventured to give his opinion why that is so; but he does not. He merely treats the matter as exceptional.

In these circumstances, I find myself bound by what I conceive to be a clear legal principle, and by the decision of the House of Lords in *Swan v. Bank of Scotland* (2). In my opinion, the guarantors to a bank of an infant's loan, where all the parties know the facts, cannot be sued.

It was further contended that, by reason of the last paragraph in the long printed document by means of which the bank indulge in these transactions, in the circumstances

(1) 28 T. L. R. 239, 240.

(2) 10 Bligh N. S. 627.

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which have arisen, that document constituted a contract of indemnity and not of guarantee. If that were so there would be no answer to the action, because the defendants would be liable as principals. The paragraph reads as follows: "The expression 'the debtor' where the principal debtor is a firm shall include the person or persons from time to time carrying on business in the name of the said firm." That clearly does not apply to the case of a single debtor. "Where the debtor is an incorporated body or society or the account is an impersonal one or in any other case to which this clause is applicable"—I cannot see what possible meaning is to be attributed to those last words—"this guarantee shall be taken to include and shall extend to all moneys heretofore or hereafter lent paid or advanced by you in any way for or on account of or apparently for the purposes of the debtor at the request or instance of or by honouring the cheques drafts bills or notes or obeying the order or directions of any of the directors or managers or officials or persons appearing to be or acting as directors or managers or officials for the time being of the debtor." Pausing there, so far, what is clearly indicated is that, if the debtor is not a person but a firm or a limited company, the bank "shall not in any way be prejudiced or affected by the want of borrowing powers on the part of the debtor." That could not be referring to an infant. "Want of borrowing powers" must refer to powers under articles of association. The words "or of the directors or managers or officials of the debtor" are also inappropriate to refer to an infant. The document continues: "or by any excess in the exercise of such powers (if any) or any irregularity defect of informality in any security given by or on behalf of the debtor or by the fact that there is no principal debtor primarily liable." I do not think that that phrase can possibly extend the transaction to an infant, when the reference is palpably to something else. This is the bank's document, and it has to be construed strictly against them. It goes on: "And all moneys so lent paid or advanced as aforesaid shall be held and taken to be money due to you from the debtor within the meaning of this guarantee." Every time the word "debtor" is used, every time the phrase "moneys due" is used, this infant who, by statute, is incapable of incurring a debt, appears to me to be impliedly excluded. The whole structure of that clause, as I interpret it, is inappropriate to the case of an individual;

it is quite plainly drawn with meticulous care, and has probably been added to and altered from time to time to cover such cases as where companies have borrowed money ultra vires. I do not think that that clause applies here. The rest of the contract is plainly one of guarantee. In my opinion, this action fails, and there must be judgment for the defendants.

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Judgment for defendants.

Solicitors for plaintiffs: *Farrer & Co.*

Solicitors for defendants: *Kramer & Co.*

WASELL v. WEST CANNOCK COLLIERY COMPANY,
LIMITED.

C. A.

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Oct. 15, 16.

Emergency legislation — Control of employment — Essential work — Scheduled undertaking—Change of work in undertaking—Work the employee might reasonably be asked to perform—Offer at reduced wages—Refusal to perform—Claim for wages over subsequent period —Condition that "willing to perform" not fulfilled—Essential Work (Coalmining Industry) Order, 1943 (St. R. & O. 1943, No. 505) art. 4 (1.) (d).

Morton,
Somervell and
Asquith L.JJ.

The plaintiff had been employed as head fireman in an undertaking scheduled under the Essential Work (Coal Mining Industry) Order, 1943. As a result of a change made to economize manpower that occupation ceased and the plaintiff was offered work as a fireman at the lower wage of a fireman. He refused to do the work and absented himself from work although he said afterwards that he would have done the work at a head fireman's wage. Subsequently he brought proceedings under art. 4 (1.) (d), of the order to recover the guaranteed wage from the date of the change. Under this sub-paragraph it was a condition of a workman being entitled to recover his guaranteed wage that he should be "capable" and available for work" (a matter not in question) and "willing" to perform any services outside his usual occupation which in "the circumstances he can reasonably be asked to perform during" any period when work is not available for him in his usual "occupation in the undertaking":—

Held, that the plaintiff had not been so "willing." He had been offered work which he could reasonably be asked to perform and he ought to have done it. If he thought rightly that he was not being offered his proper wage (a question that was not decided), he ought still to have done the work and immediately raised the question of the rate of wages.

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APPEAL from Walsall county court.

As from 1935 the plaintiff Isaac Wassell was employed by the defendants, the West Cannock Colliery Co., Ltd. as a fireman at their pit and in November, 1942, he was appointed head fireman of No. 5 plant with two firemen under him at an increased pay. He was paid for seven shifts on doing six shifts and was allowed ten days holiday with pay, pay on public holidays and fourteen days sick pay. He was also given twenty cwt. of coal every two months. The colliery was a scheduled undertaking within the meaning of the Essential Work (Coalmining Industry) Order, 1943. Early in July, 1945, the plaintiff went for a holiday reporting back to work on July 18. In the meantime the manager of the mine had made a change with a view to economizing manpower by which instead of a head fireman and two firemen, there were to be only two firemen in each plant so as to release one man for work at the coal face. He therefore told the plaintiff that he was to work as a fireman only. The plaintiff then refused to go down the pit and after consulting his union had an interview on the following day and several interviews afterwards at which he was told that all the work he could be given was fireman's work with fireman's pay. In these circumstances the plaintiff stayed away from work and had his working clothes taken home. He only reported at the pit every Saturday in regard to income tax refund. The defendants appealed to the national service officer for leave to dismiss the plaintiff but this was refused. On January 11, 1946, the plaintiff brought proceedings in the county court, alleging that he was capable of and available for work, apart from a time when he was ill and claimed 18*ol.* 14*s.* 6*d.* wages. The defendants resisted this claim alleging that in the circumstances the plaintiff could reasonably be asked to work as a fireman and that he was and had been unwilling to perform the work. They also contended that since July 18, 1945, the plaintiff had not been capable of and available for work. There was a counterclaim for 20*l.* 8*s.* 8*d.* for an earlier overpayment to the plaintiff, which was admitted.

The county court judge found on the evidence that a head fireman was a recognized grade or status of workman and that the work of a head fireman was no longer available as from July 18, 1945, as the result of a bona fide change made with the object of producing more coal. He thought the work offered to the plaintiff was reasonable and the plaintiff had

said in the box that he was willing to do it. It was essential under art. 4 (1.) (d) of the Essential Work (Coalmining Industry) Order, 1943, that the plaintiff should have been willing to perform the services of a fireman because although they might be said to be outside his usual occupation, they were certainly services which he could be reasonably asked to perform when his work as a head fireman was not available. The plaintiff must also have been capable of and available for the work. He did not think it was necessary for the plaintiff to show that he was capable of and available for work by going day by day saying: "send me down the pit for the kind of work at the kind of rate to which I am entitled." He was satisfied that the plaintiff was capable of and available for work except when he was ill from bronchitis and that if he had been offered work at the head fireman's rate, he would have accepted it. He did not think the defendants were entitled to say "you must do fireman's work at fireman's wages." The plaintiff was therefore entitled to judgment for the amount claimed less the amount of the counterclaim.

The defendants appealed. The material provisions of the Essential Work (Coalmining Industry) Order, 1943, are set out in the judgment of Morton L.J. Some points were raised in argument which in view of the judgment need not be reported.

Beney K.C. and *R. H. Norris* for the defendants. The defendants as persons carrying on a scheduled undertaking under the Essential Work (Coalmining Industry) Order, 1943, were entitled under art. 4 (1.) (d) to require the plaintiff to do some other work in the same undertaking, as the original work was not available and as the county court judge found, the new work was one he could reasonably be asked to perform. In order therefore that the plaintiff should recover the guaranteed wages he must show that he was "capable of and available for" the work and that he was "willing" to perform it. The plaintiff by absenting himself from work ceased to be "willing." He was offered fireman's work at a fireman's wage and this the county court judge has held that the defendants were not entitled to do. This is contrary to the terms of the order. The object of the order is to keep men at work. The plaintiff was not entitled to stop work: see *Adrema, Ltd. v. Jenkinson* (1). It is immaterial whether or not he ought to

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have been given the higher wage of a head fireman. He ought to have gone to work and then raised the question of the proper rate of wages.

Fox Andrews K.C. and *Norman Carr* for the plaintiff. It is an extraordinary contention that the plaintiff must take work offered to him in the absence of his old work, whatever wage the employers choose to pay. [SOMERVELL L.J. That is not the argument.] It is said that he is no longer entitled to the guaranteed wage of his old job but only to the wage of the new work. That is contrary to the Conditions of Employment and National Arbitration Order, 1940, referred to in art. 4 (1.) (d) of the order of 1943: [They referred to *George v. Mitchell & King* (1).] The plaintiff is under no obligation to work seven shifts instead of six so as to earn what he did in his employment of head fireman. The obligation of the employers is to pay the guaranteed wage. The employers cannot pay the workman a lesser wage and leave him to his legal remedy, if any. The plaintiff has been found to be capable and available by the county court judge. The plaintiff was also willing to do the work. He would have done it if offered head fireman's wage.

Beney K.C. in reply. By refusing to go down the pit, the plaintiff showed himself unwilling to do the work he had reasonably been offered.

MORTON L.J. This is an appeal by the defendants from an order of the county court judge giving the plaintiff, Mr. Wassell, judgment for 18*ol.* 14*s.* 6*d.* wages. There was a counterclaim by the defendants for 20*l.* 8*s.* 6*d.* which succeeded, and there was no cross-appeal as to this by the plaintiff. The case turns upon the construction of the Essential Work (Coalmining Industry) Order, 1943, and in particular of art. 4 (1.) (d) of that order. [His Lordship stated the facts down to the date of the plaintiff's return from a holiday on July 18, 1945, and continued:] I now quote the learned judge's judgment: "In the meantime, Mr. Ford, the manager, had carried out certain work with a view to economizing manpower, and he was proposing, on behalf of the defendants, to manage in future with two firemen so as to relieve one for work at the coal face. This meant, of course, that in future, instead of having a head fireman and two firemen, he should have two firemen only; and he was proposing that Mr. Wassell should be one of those

(1) [1943] 1 All E. R. 233.

"firemen instead of the head fireman over the others. He put "this to Mr. Wassell when he returned from his holiday." The learned judge then goes on to refer to what appears to have been the only dispute on the evidence, and he finds as a fact that Mr. Ford said: "This is what I am doing, and you will "now work as a fireman." The learned judge goes on: "I do "not think it is in dispute that by working longer hours the "plaintiff might have earned as much as he did as a head "fireman. One advantage a head fireman had was to be paid "for seven shifts while only working six. That is the offer "of the company, and it is quite clear that the plaintiff refused "it. He consulted his union agent and there was an interview "the next day, the nineteenth, and several interviews afterwards, one in September, when Mr. Clarke was there, and "another, when Mr. Latham, the manager, who had been away "ill for a long time, was present. In all these interviews the "issue was the same: 'All the work we can give you is fireman's work, and we must pay you fireman's wages'." I would add to that that in his evidence the plaintiff said this: "I refused to go down the pit He told me work was "available as a fireman I did not accept it. I asked "Mr. Bates to take my things home." That is, I apprehend, his working clothes: "He took them, and they have been home "since I was only prepared to do work as a head "fireman." Then, in re-examination, he said: "I would have "have accepted work as a fireman with terms of a head fireman."

It seems to me that the position, having regard to the learned judge's finding and the evidence, was this. He found that the plaintiff would have done the work of a fireman if he had been offered the wages—nothing is said about the other terms—of a head fireman. On the other hand, there is not a shred of evidence that the plaintiff ever said to his employers: "If you "pay me the wages of a head fireman I am willing to work "as a fireman." The learned judge has held that he would have been willing to work on those terms, but it does not appear that he ever said so. The employers say: "You can work as a "fireman and get a fireman's wages," but they never say: "You can work as a fireman and at a head fireman's wages." The workman simply refuses the work and does not say, although it was apparently in his mind according to the finding, that if he got a head fireman's wages he would do the work.

On September 25, 1945, the defendants made application to the national service officer for permission to determine the

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plaintiff's employment, stating, as was the fact, that he had not attended for work since July 18. On October 24, the national service officer refused his permission and the defendants did not appeal. The plaintiff remained at home, not attending the works except for visiting the pit weekly to obtain an income tax refund. So matters went on until January 12, 1946, when the plaintiff claimed his full wages as a head fireman for the period from July 18 to 25. Then there was a period during which he did not claim his wages because he was ill. He also claimed his full wages as a head fireman from September 4 to January 11, 1946. The county court judge has found him to be entitled to the sum claimed. There is no dispute before us as to the figures.

I think it is convenient to refer to the relevant portions of the order in question, before I deal with the findings of the learned county court judge. We were referred to reg. 58A of the Defence Regulations, 1939, and in particular to para. 4 (a) of that regulation. I do not think I need read it because there is no question of the subsequent order which we have to consider being ultra vires. Turning to the order of 1943, in art. 1, "Scheduled undertaking" is defined as follows: " 'Scheduled undertaking' means an undertaking that has 'been entered into in the Schedule of undertakings under this 'Order.' There is no question that the defendants' undertaking was a "scheduled undertaking." Article 4 (1.) is as follows: "Subject as hereafter provided, where a person "carries on a scheduled undertaking the following provisions "shall apply: (a) The person carrying on the undertaking "shall not terminate (except for serious misconduct) the "employment in the undertaking of any person employed "therein, or without terminating such employment cause "him to give his services in some other undertaking (except in "case of emergency for a period not exceeding fourteen days) "except with the permission in writing of a national service "officer. (b) A person employed in the undertaking shall not "leave his employment except with such permission as "aforesaid." The effect of these provisions is that, except in the case of serious misconduct or leave from the national service officer, these two parties are bound together. Sub-paragraph (c) provides for not less than one week's notice of termination of the employment being given, except in the case of serious misconduct. It is sub-para. (d) upon which this case turns: "Without prejudice to any terms and conditions of

“employment more favourable to persons employed in the undertaking than may be provided for by the Conditions of Employment and National Arbitration Order, 1940, or by that Order as amended by any subsequent Order, the person carrying on the undertaking shall in respect of every week pay to every person employed in the undertaking (except as otherwise provided in this Order) a sum which is not less than the guaranteed wage for that week if that person is during his normal working hours (i.) capable of and available for work ; and (ii.) willing to perform any services outside his usual occupation which in the circumstances he can reasonably be asked to perform during any period when work is not available for him in his usual occupation in the undertaking.” Then follow certain definitions which I think, having regard to the view which I take in this case, I need not read. It appears to me that the intention of art. 4 (1) (d) is to get as much work done as possible ; a man may be put to work on something else if work is not available for him in his usual occupation. I would also observe that the minimum wage is to be paid if, but only if, the workman fulfils the conditions laid down by that sub-paragraph.

I now return to the learned judge's judgment to see what the findings of fact are. He first of all finds as a fact that the work of a head fireman was not available. He says that he thinks the proposed reconstruction was quite bona fide. He also says this : “ I think it was reasonable to expect Mr. Wassell “ to undertake those duties ” ; that is to say, the duties of an ordinary fireman. That is elaborated a little later on when the learned judge remarks : “ I have said in my opinion it is “ essential that Mr. Wassell should have been willing to “ perform these services as a fireman because, although they “ may be said to be outside his usual occupation, they were “ certainly services which he could be reasonably asked to “ perform when his work as a head fireman was not available.” I take that to be a finding that, in the circumstances, the plaintiff could reasonably be asked to perform the work of a fireman. The learned judge then goes on to consider the question whether the plaintiff was capable of and available for work during the period for which he claimed his wages, and he finds that the plaintiff was capable of and available for work. As I have said, he also finds that if the plaintiff had been offered work at the head fireman's rate he would have taken it. The learned judge goes on to point out, as is undoubtedly the fact, that the

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plaintiff's employment had never been determined at all; and he found that the company were liable to pay him wages, although the plaintiff had not done any work during the period in question. There is only one other portion of the judgment to which I think I should refer. In answer to a question by Mr. Norris for the defendants, the learned judge said: "I think it must follow that, if they offered him fireman's work at the normal figure of fireman's rate, that is a reasonable remuneration for that kind of work for a man employed to do that work."

Having regard to those findings, I turn back to art 4 (1.) (d), because it is plain that in this case the plaintiff has based himself upon art. 4 (1.) (d) and has claimed that he is entitled to not less than the guaranteed wage as defined in the order. First of all, was the plaintiff during his normal working hours capable of work? I think there is no doubt that he was, except during the period of illness for which he has not claimed. Was he available for work? I am prepared to assume in favour of the plaintiff, without deciding the point, that he was available for work in the circumstance which I have stated. Was he willing to perform any service outside his usual occupation which in the circumstances he could be reasonably asked to perform during the period when work was not available for him in his usual occupation? In my view, on the findings of fact of the learned judge, that question must be answered in the negative. The judge has held that work was not available for the plaintiff in his usual occupation. He has held that the services outside his usual occupation which he was asked to perform, namely, the services of fireman, were services which he could reasonably be asked to perform. To my mind, it is perfectly plain that the plaintiff, in any ordinary meaning of the word "willing," was not "willing" to perform those services. In his own mind he may have resolved, if and when he was offered a head fireman's wage, that he would do the work of a fireman; but he never seems to have expressed that. He simply refused to do the work of a fireman. It seems to me to follow that he has not qualified for the amount which was awarded to him by the county court judge.

Mr. Fox Andrews and Mr. Carr for the plaintiff have contended that the wage which ought to have been offered to the plaintiff was the full wage of a head fireman, notwithstanding that he was being asked to do only fireman's work. To my mind, that is a very difficult question, on which we have heard

a most interesting argument ; but I have not myself formed a concluded view upon it. I am prepared to assume in favour of the plaintiff that Mr. Fox Andrews' contention is right, and that the employers were wrong in offering to the plaintiff only the ordinary fireman's wage. Even so, I think that the plaintiff fails to qualify for the remuneration which he claims. The emphasis in the paragraph in question is on the services. Were the services which he was asked to perform services which in the circumstances he could reasonably be asked to perform ? There was no work available for him as a head fireman. There was work available for him as a fireman, and the judge so held. He could reasonably be asked to perform those services, but he was not willing to perform those services. If he thought that he was not being offered a proper wage, his proper course was to do the work and at once raise the question of the wages, and, if necessary, test the matter in the county court. Instead of that, he took the step of refusing to do the work, with the result that for some months he did no work, and his services were lost to the industry. I think, on the plain wording of this sub-paragraph, he did not qualify for the wages. The amount of his wages is regulated by the order. If he had started to work as a fireman, and the parties had failed to agree as to the amount of wages payable on the true construction of the order, the matter could have been settled either by argument, or, if necessary, by legal proceedings.

Mr. Fox Andrews also put forward the argument that the plaintiff was asked to work for more than his working hours. I do not myself think that that argument can be supported. It was true it was pointed out to the plaintiff that, if he chose to work seven shifts, he would get paid for seven shifts ; but I cannot see that that was made any condition of his working ; it was merely an observation directing his attention to the fact that he could earn more wages if he chose.

On the view which I have taken on the short point put forward by Mr. Beney for the defendants, the appeal must succeed. I refrain from examining the very interesting further arguments put forward by Mr. Norris on behalf of the defendants. Two cases were cited to us. The first one was a decision of a Divisional Court in the case of *Adrema, Ltd. v. Jenkinson* (1). I do not think it necessary to refer to the facts of that case, or the decision, as there has been no suggestion in the present case that the plaintiff's employment was terminated by what

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took place. We were also referred to certain observations of this court in *George v. Mitchell & King* (1). I do not think it is necessary to refer to any of the observations of the court in that case because the facts there were different from the facts in the present case in this vital particular: that in the case of *George v. Mitchell & King* (1) the work was available for the workman in his usual occupation, whereas that is not so in the present case.

In my view, the judgment awarding this sum to the plaintiff cannot stand, and this appeal should be allowed.

SOMERVELL L.J. I agree with the judgment which has been delivered; but, as we are differing from the learned county court judge, I will add a few observations on the construction of the paragraph of the order on which this appeal depends. I will not repeat the facts which have already been fully stated, nor will I re-read the relevant parts of the order.

In this case the plaintiff claims wages from the defendants as his employers over a period during which he did not work for them. He puts forward that claim under, and by virtue of the provisions of art. 4 of the Essential Work (Coalmining Industry) Order, 1943, to which my Lord has already made reference. This case turns on the construction of art. 4 (1.) (d) of the order and in particular of sub-para. (d) (ii.). One purpose, perhaps the main purpose, of sub-para. (d) is to deal with cases where the employer is unable to offer work which would, on the applicable wage rates, enable the person employed to earn his ordinary wage. A very obvious example, which must have occurred many times in the war, is where a man's normal employment is working on some material which for a particular week or for a period has not come forward from the suppliers so that there is nothing for that workman to do, at any rate, at his ordinary job. As this order ties the workman to the employment, subject to serious misconduct or the consent of the national service officer, and as it is clear from the order that it might be desirable to keep men in their existing employment, although there was temporarily no work for them to do, it would have been unreasonable to keep a man so tied, unless he was paid something in the nature of the average wage which he was able to earn when work at his ordinary job was available for him. This sub-paragraph in fact provides, possibly among other things, that if he is there and willing to

(1) [1943] 1 All E. R. 233.

work he will get the guaranteed wage as defined, although the employer may be unable to give him work to do.

The sub-paragraph also provides (and this, of course, is the point on which the case turns) that if the ordinary work is not available for the man he can be asked to do other work, and he must be ready to do that work if he is to qualify for the guaranteed wage.

As has been stated, arguments were addressed to us on the point which arises in cases where a man has been asked to do work other than his ordinary work of what remuneration he is to receive. It was submitted on the one hand by counsel for the defendants—in particular by Mr. Norris—that where alternative work, held to be reasonable within the meaning of the words of the order, is offered, it carries its normal wage; that is to say, the normal rate of the alternative work. That is a circumstance to be taken into account in deciding whether the man can reasonably be asked to do that work. On the other hand, it was submitted by Mr. Fox Andrews that, where a man is asked to do work other than his ordinary work, he is entitled, under the order, to what I will call his old rates applied on a calculation of the guaranteed minimum if the normal rate for the new work is less than the sum so arrived at. I agree with my brother Morton that that question is not an easy one, and I express no view about it, because, in my view, this appeal succeeds even assuming that Mr. Fox Andrews is right in the submission which he made on that point.

The position in the present case is that the plaintiff was asked to perform work which he could, on the learned county court judge's finding, be reasonably asked to perform. On the other hand, on the assumption which I am making, the terms proposed by the employers, the defendants, were less favourable than the terms which the plaintiff would have been entitled to claim and get under the order. Supposing he had done the work, then clearly the employers were only willing to pay fireman's rates, and he could have put forward his claim for the excess. The employers might have agreed, or the lawyers might have agreed, to that claim, or it might have been necessary to take the matter to the court.

I entirely agree with what my brother Morton has said with regard to the result of the learned county court judge's findings on the evidence as to what took place between the plaintiff and the defendants at the material date, namely, July 18, and after. If the plaintiff had taken the line: "I am perfectly

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"willing to do fireman's work but I claim that on doing that work I am entitled to head fireman's rates and conditions," it seems to me to be at least probable that the employers would have said: "Well, get ahead with the work; of course we will pay you what you are entitled to under the order. Let our lawyers get together and let us hope they will agree about it," with the result that the work would have been done. But the plaintiff did not take that line. In those circumstances, he seems to me to have failed to satisfy the condition of showing that he was willing to perform the services outside his usual occupation, which, as found by the learned county court judge, he was reasonably being asked to perform. For these reasons, I think the appeal succeeds.

ASQUITH L.J. I agree, and cannot usefully add anything.

Appeal allowed.

Solicitors: *Peacock & Goddard for Ernest W. Haden & Stretton, Walsall; Sharpe, Pritchard & Co., for Underhill, Willcock & Taylor, Wolverhampton.*

H. C. G.

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In re THE AFFAIRS OF A. W. BRETT-PITT.

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Oct. 17.

Morton,
Somervell and
Asquith L.JJ.

Emergency legislation—Liabilities adjustment order—Application to vary—No variation obtainable for time before the application—Liabilities (War-Time Adjustment) Act, 1941 (4 & 5 Geo. 6, c. 24), s. 10, sub-s. 2—Liabilities (War-Time Adjustment) Act, 1944 (7 & 8 Geo. 6, c. 40), Sch. II.

The provision in the Liabilities (War-Time Adjustment) Act, 1941, s. 10, sub-s. 2, as amended by the Liabilities (War-Time Adjustment) Act, 1944, Sch. II., giving any person whose rights are affected by a liability adjustment order power to apply for a variation of the order only enables him to obtain a variation as from the date of the application to vary.

In re The Affairs of D. S. Smith [1944] K. B. 142 applied.

APPEAL from Southend county court.

Arthur William Brett-Pitt (hereinafter called the debtor) was a builder in Southend and district and became before the war the owner of various properties subject to existing mortgages thereon including shops and flats in Woodgrange Drive, Thorpe

Bay, mortgaged to Barclays Bank, Ltd. to secure a sum exceeding 6,000*l.* with interest at five per cent. per annum. On October 26, 1944, the debtor applied to a liabilities adjustment officer for advice and assistance regarding his financial difficulties brought about by the war. A protection order was made on December 18, 1944, and on April 12, 1945, an interim liabilities adjustment order was made which did not however relate to the mortgage interest of over 2,000*l.* then due to the bank which was left to be dealt with by a subsequent order. On July 12, 1945, another interim liabilities adjustment order was made by Judge Trevor Hunter, after hearing the liabilities adjustment officer, the debtor and the branch manager for the bank, that no interest should be payable to the bank in respect of this mortgage for the period from January 1, 1940, to June 30, 1945, and that for the period from July 1, 1945, to December 31, 1945, no interest was to be paid and that the position should then be reconsidered. There was no appeal from that order but on December 28, 1945, the bank applied for an order rescinding and setting aside the interim adjustment order made on July 12, 1945, and for such further order as might be just. The grounds of the application were (a) that in considering whether or not the interest under the mortgage should be reduced, regard ought to be had to the increase in the capital value of the properties concerned; (b) that in all the circumstances, the order was inequitable; (c) that the order ought not to have been made; (d) that since the date of the order the net annual value of the properties had increased; and (e) that since the date of the order, the capital value of the properties had increased.

Judge Andrews felt bound by *In re The Affairs of D. S. Smith* (1) and dismissed the application. The bank appealed but on the appeal the preliminary objection was taken by the liabilities adjustment officer that the bank, having failed to appeal from the order of July 12, 1945, could not by an application under the Liabilities (War-Time Adjustment) Act, 1941, s. 10, sub-s. 2, as amended by the Liabilities (War-Time Adjustment) Act, 1944, Sch. II. (2), obtain a change of the

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(1) [1944] K. B. 142.

(2) Liabilities (War-Time Adjustment) Act, 1944, s. 10, sub-s. 2 (as amended): "Any liabilities adjustment order or protection order may, on the application of

"the debtor or of any creditor
"whose debt has been proved or of
"the liabilities adjustment officer
"or of any other persons
"whose rights are affected by a
"liabilities adjustment order be

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1946 rescission.

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Aronson for the liabilities adjustment officer. The bank is out of time for appealing from the order of July 12, 1945, and it cannot by an application under s. 10, sub-s. 2, of the Act of 1941 (as amended) obtain the result of a successful appeal. This case is directly covered by *In re the Affairs of D. S. Smith* (1). The application in this case was only made three days before the order of July 12, 1945, ceased to operate for admittedly the full interest on the mortgage debt has been paid since January 1, 1946. At the outside therefore the bank could only obtain a variation of the order so far as it affects those three days. An order cannot be obtained setting aside the order of July 12, 1945, as regards the past; see also r. 23 of the Liabilities (War-Time Adjustment) Rules, 1944, under which the application of December 28, 1945, is made. The bank could not create for themselves a right of appeal after the time for appealing had expired.

Melford Stevenson K.C. and *S. K. De Ferrars* for the bank. *In re The Affairs of D. S. Smith* (1) was decided in November, 1943, before the amendment allowing an application by a creditor who had not proved for the debt, and it was on that ground that the case was decided. Section 10, sub-s. 2, of the Act of 1941 (as amended by the Act of 1944), provides that any order may be varied on a subsequent application by any person whose interests are affected.

That application is made under r. 23 of the 1944 rules, and there is nothing to prevent a variation as regards the past. It was by an error that the request for rescission of the earlier order was made. It is in effect an application to vary. Under such an application there must be power to vary any part of the earlier order. What has happened is that since the order of July 12, 1945, was made, the annual value of the property has increased. That increase dates from the end of the war. It would be most unfortunate to hold that power to vary only

"varied by a subsequent order,
"and, in particular, when a liabi-
"lity adjustment order reduces
"the rate of mortgage
"interest payable in respect of any
"mortgaged property, an appli-
"cation for the variation of the
"order may be made on the

"ground that the lettable value
"of the premises or, as the case
"may be, the net annual values
"of the mortgaged property has
"altered since the date of the
"order."

(1) [1944] K. B. 142.

operated for the future. Variation is not limited in meaning to variation in futuro.

Aronson replied.

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MORTON L.J. (after stating the facts). A preliminary objection to the appeal has been taken by Mr. Aronson, for the liabilities adjustment officer. He says, in effect, that as there was no appeal from the order of July 12, 1945, it is not open to the appellants to challenge that order in the way in which they have sought to challenge it by making the application of December 28.

[His Lordship then read s. 10, sub-s. 2 of the Liabilities (War-Time Adjustment) Act, 1941, as varied by the Liabilities (War-Time Adjustment) Act, 1944.] Mr. Aronson contends that that sub-section does not enable the bank to vary the order of July 12, 1945, so far, at least, as it refers to interest falling due before the date of the application to vary. He says that the section is not intended to deal with interest which has accrued in the past and that the only way in which the bank could have disturbed the order as to any interest which accrued before December 28, 1945, was by appealing from the order of July 12, 1945, and that they did not do. I should add that the bank come within s. 10, sub-s. 2, of the Act of 1941 as amended by the Act of 1944, although they have not proved their debt. In support of his proposition Mr. Aronson relies upon the case of *In re The Affairs of D. S. Smith* (1). In that case the debtor, who had mortgaged property to a building society and had fallen into arrears with his fortnightly instalments, applied, on January 16, 1942, to the county court for a protection order under the Act of 1942, and a protection order was made. "The mortgagees did not prove for their debt and informed the liabilities adjustment officer that they relied on their security. "On March 6, 1943, the county court judge made an adjustment order which contained no reference to the secured creditors and made no provision for payment of the interest under the mortgage." The order contained a provision giving liberty to apply. "On June 29, 1943, the mortgagees made an application to the county court judge to vary the adjustment order by providing for the payment to the mortgagees of the mortgage interest which had accrued since the date of the protection order. The county court judge, in the exercise of his discretion, refused to vary his original order. The

(1) [1944] K. B. 142.

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"mortgagees appealed to the court of appeal against that "refusal." It is to be observed that there, as here, the mortgagees were endeavouring to get interest which had accrued since the date of the protection order and prior to the date of their application. There is this difference, that in the present case the order expressly provides for no payment of interest to the bank for the period I have mentioned, whereas in the case of *In re The Affairs of D. S. Smith* (1) no provision was made for interest. A preliminary objection was taken in that case, as in the present case, on behalf of the liabilities adjustment officer and it was in substance the same objection which Mr. Aronson has taken before us to-day. Simonds J. (as he then was) delivered the judgment of the court and, after dealing with the facts, he proceeded: "We do not think it "necessary to express any opinion on these questions"—that is, the questions which were in issue on the appeal—"for counsel for the liabilities adjustment officer, whose duty "it was to assist the court, has taken the preliminary point "that the Society's application, made on June 29, 1943, was "out of order and should not have been entertained by the "county court judge, and that an appeal from his order should "not be entertained by this court. In our judgment, the "preliminary point succeeds." The learned judge went on to point out that the society, in the case before him, did not come within s. 10, sub-s. 2 of the Act of 1941, as it had not yet been amended. He then went on: "Nor, indeed, if the society "was a competent applicant, was the application to vary one "that fell within the scope of the sub-section, for, in our "judgment, it is clear that the sub-section aimed at giving the "court power to amend or vary its original order where cir- "cumstances have changed or, perhaps, unknown "circumstances have come to light. It cannot be interpreted "so as to give to a person who challenges the validity of an "order a right of appeal from it by way of an application to "vary after the time for appeal to the Court of Appeal has "expired and then an appeal to the Court of Appeal from the "refusal to vary."

It seems to me that the observations last quoted really apply to the present case. In the present case, by their application of December 28, 1945, the appellants were seeking to challenge the order which had been made by the county court judge in regard to interest accrued up to that date. In my judgment, for the

reasons given in the case of *In re The Affairs of D. S. Smith* (1) it is not open to them to do that. They are, in effect, appealing from the order of the county court judge after the time for appealing has expired. I think that all they could do was to apply to vary the order as regards the three days between December 28, 1945, and December 31, 1945, on the ground that there had been a change of circumstances since the learned judge made his order. When an order has been made dealing with mortgage interest or rent in futuro, and circumstances have changed, an application can then be made for the variation of the order as from the date of the application. I asked Mr. Melford Stevenson, leading counsel for the bank, whether he desired to have the question investigated in regard to the three days of interest from December 28 to 31, 1945; and I was not surprised when he replied that he did not.

I would only desire to add this. Reliance was placed upon r. 23. Without expressing any opinion as to whether that rule applies to a party in the position of the bank in the present case, it seems to me that precisely the same objection applies to any argument based upon r. 23 and that the reasoning in *In re The Affairs of D. S. Smith* (1) covers the matter.

I think that the preliminary objection, therefore, succeeds.

SOMERVELL L.J. I agree. I think that on the construction of s. 10, sub-s. 2, of the Liabilities (War-Time Adjustment) Act, 1941, the power to vary thereby conferred on the court is a power to vary as from the date of the application contemplated. But so far as the present application is concerned, apart from the three days, it seems to me completely covered by what was said in the case of *In re The Affairs of D. S. Smith* (1), which has already been referred to. For these reasons I do not desire to add anything to the judgment which has been delivered, with which I agree.

ASQUITH L.J. I agree. *In re The Affairs of D. S. Smith* (1) seems to me to conclude this appeal.

Appeal dismissed.

Solicitors : *Treasury Solicitor ; Durrant Cooper & Hambling.*

(1) [1944] K. B. 142.

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[1949] 1 K. B. 227

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TRINITY HOUSE DIVISION.

Referred to, CHARLES
RICKARDS, LD. v.
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[1950] 1 K. B. 617

Considered, COMBE
v. COMBE
[1951] 2 K. B. 215

Referred to, PERROTT
& CO. LD. v. COHEN
[1951] 1 K. B. 705

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CENTRAL LONDON PROPERTY TRUST LIMITED v. HIGH TREES HOUSE LIMITED.

July 18.

Denning J.

Contract—Agreement intended to create legal relations—Promise made thereunder—Knowledge of promisor that promisee will act on promise—Promise acted on—Enforceability of agreement without strict consideration—Agreement under seal—Variation of by agreement of lesser value—Estoppel.

By a lease under seal dated September 24, 1937, the plaintiff company let to the defendant company (a subsidiary of the plaintiffs) a block of flats for a term of ninety-nine years from September 29, 1937, at a ground rent of 2,500*l.* a year. In the early part of 1940, owing to war conditions then prevailing, only a few of the flats in the block were let to tenants and it became apparent that the defendants would be unable to pay the rent reserved by the lease out of the rents of the flats. Discussions took place between the directors of the two companies, which were closely connected, and, as a result, on January 3, 1940, a letter was written by the plaintiffs to the defendants confirming that the ground rent of the premises would be reduced from 2,500*l.* to 1,250*l.* as from the beginning of the term. The defendants thereafter paid the reduced rent. By the beginning of 1945 all the flats were let but the defendants continued to pay only the reduced rent. In September, 1945, the plaintiffs wrote to the defendants claiming that rent was payable at the rate of 2,500*l.* a year and, subsequently, in order to determine the legal position, they initiated friendly proceedings in which they claimed the difference between rent at the rates of 2,500*l.* and 1,250*l.* for the quarters ending September 29 and December 25, 1945. By their defence the defendants pleaded that the agreement for the reduction of the ground rent operated during the whole term of the lease and, as alternatives, that the plaintiffs were estopped from demanding rent at the higher rate or had waived their right to do so down to the date of their letter of September 21, 1945.

Held (1.) that where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promisee, the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even although the promise may not be supported by consideration in the strict sense and the effect of the arrangement made is to vary the terms of a contract under seal by one of less value; and

(2.) that the arrangement made between the plaintiffs and the defendants in January, 1940, was one which fell within the above category and, accordingly, that the agreement for the reduction of the ground rent was binding on the plaintiff company, but that it only remained operative so long as the conditions giving rise to it continued to exist and that on their ceasing to do so in 1945 the

plaintiffs were entitled to recover the ground rent claimed at the rate reserved by the lease.

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ACTION tried by Denning J.

By a lease under seal made on September 24, 1937, the plaintiffs, Central London Property Trust Ltd., granted to the defendants, High Trees House Ltd., a subsidiary of the plaintiff company, a tenancy of a block of flats for the term of ninety-nine years from September 29, 1937, at a ground rent of 2,500*l.* a year. The block of flats was a new one and had not been fully occupied at the beginning of the war owing to the absence of people from London. With war conditions prevailing, it was apparent to those responsible that the rent reserved under the lease could not be paid out of the profits of the flats and, accordingly, discussions took place between the directors of the two companies concerned, which were closely associated, and an arrangement was made between them which was put into writing. On January 3, 1940, the plaintiffs wrote to the defendants in these terms, "we confirm the arrangement made " between us by which the ground rent should be reduced as " from the commencement of the lease to 1,250*l.* per annum," and on April 2, 1940, a confirmatory resolution to the same effect was passed by the plaintiff company. On March 20, 1941, a receiver was appointed by the debenture holders of the plaintiffs and on his death on February 28, 1944, his place was taken by his partner. The defendants paid the reduced rent from 1941 down to the beginning of 1945 by which time all the flats in the block were fully let, and continued to pay it thereafter. In September, 1945, the then receiver of the plaintiff company looked into the matter of the lease and ascertained that the rent actually reserved by it was 2,500*l.* On September 21, 1945, he wrote to the defendants saying that rent must be paid at the full rate and claiming that arrears amounting to 7,916*l.* were due. Subsequently, he instituted the present friendly proceedings to test the legal position in regard to the rate at which rent was payable. In the action the plaintiffs sought to recover 625*l.*, being the amount represented by the difference between rent at the rate of 2,500*l.* and 1,250*l.* per annum for the quarters ending September 29, and December 25, 1945. By their defence the defendants pleaded (1.) that the letter of January 3, 1940, constituted an agreement that the rent reserved should be 1,250*l.* only, and that such agreement related to the whole term of the lease;

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(2.) they pleaded in the alternative that the plaintiff company were estopped from alleging that the rent exceeded 1,250*l.* per annum and (3.) as a further alternative, that by failing to demand rent in excess of 1,250*l.* before their letter of September 21, 1945 (received by the defendants on September 24), they had waived their rights in respect of any rent, in excess of that at the rate of 1,250*l.*, which had accrued up to September 24, 1945.

Fortune for the plaintiffs. The plaintiffs are entitled to recover rent on the basis of it being at the rate of 2,500*l.* a year, the amount reserved by the lease. The document in question was under seal and consequently could not be varied by a parol agreement or an agreement in writing not under seal. If there was a fresh agreement, it was void since it was made without consideration and in any event it was only an agreement of a purely temporary character necessitated by the difficult conditions prevailing when it was made, and coming to an end when those conditions ceased to exist at the end of 1944 or the beginning of 1945. Even supposing that the plaintiffs were held to be estopped from denying the existence of a new agreement, such estoppel would only operate so long as the conditions giving rise to the arrangement on which the estoppel was based, continued. [Denning J. This subject was considered by Simonds J. in *Re William Porter & Co., Ltd.* (1).] It has recently been considered by Humphreys J. in *Buttery v. Pickard* (2). He also referred to *Forquet v. Moore* (3), *Crowley and Others v. Vitty* (4) and *Foa, Landlord and Tenant*, 6th ed., p. 701.

Ronald Hopkins for the defendants. The company are only liable to pay rent at the rate of 1,250*l.* per annum. The letters passing between the parties and the entry in the minute book of the plaintiff company constitute evidence of an agreement, which, although possibly not supported by such consideration as would strictly be necessary at common law, was of a type which a court of equity would enforce if it were satisfied that the parties intended to give contractual efficacy to that to which they were agreeing. The reduction in rent was made so that the defendants might be enabled to continue to run their business and that was sufficient to enable a court to hold the agreement binding on the plaintiff company. With regard

(1) [1937] 2 All E. R. 361.

(2) [1946] W. N. 25.

(3) (1852) 22 L. J. (Ex.) 35.

(4) (1852) 21 L. J. (Ex.) 135.

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to the variation of an agreement under seal by a parol agreement or an agreement in writing, in *Berry v. Berry* (1), Swift J. said it was true that a covenant could not be varied except by some contract of equal value, but, he continued "although that was the rule of law, the courts of equity have always held themselves at liberty, to allow the rescission or variation by a simple contract of a contract under seal by preventing the party who has agreed to the rescission or variation from suing under the deed. In *Nash v. Armstrong* (2) it was held that a parol agreement not to enforce performance of a deed and to substitute other terms for some of its covenants was a good consideration for a promise to perform the substituted contract . . ." If the above contentions fail, the defendants rely on the doctrine of estoppel. The propositions of law laid down in *Re William Porter & Co., Ltd.* (3) exactly apply to the present case. The reduction in the rent was made in order that the defendants might be able to carry on their business. As a result of the reduction the business was carried on and the defendants arranged their affairs on the basis of the reduced rent with the result that the plaintiffs are estopped from claiming any rent beyond 1,250*l.* per annum for the whole period of the lease. Finally, the letters passing between the parties constituted a waiver by the plaintiffs of their right to a higher rent than 1,250*l.* down to the date of their letter of September 21, 1945.

Fortune in reply.

DENNING J. stated the facts and continued: If I were to consider this matter without regard to recent developments in the law, there is no doubt that had the plaintiffs claimed it, they would have been entitled to recover ground rent at the rate of 2,500*l.* a year from the beginning of the term, since the lease under which it was payable was a lease under seal which, according to the old common law, could not be varied by an agreement by parol (whether in writing or not), but only by deed. Equity, however stepped in, and said that if there has been a variation of a deed by a simple contract (which in the case of a lease required to be in writing would have to be evidenced by writing), the courts may give effect to it as is shown in *Berry v. Berry* (4). That equitable doctrine, however, could hardly apply in the present case because the variation here

(1) [1929] 2 K. B. 316, 319.

(3) [1937] 2 All E. R. 361.

(2) (1861) 10 C. B. (N. S.) 259.

(4) [1929] 2 K. B. 316.

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might be said to have been made without consideration. With regard to estoppel, the representation made in relation to reducing the rent, was not a representation of an existing fact. It was a representation, in effect, as to the future, namely, that payment of the rent would not be enforced at the full rate but only at the reduced rate. Such a representation would not give rise to an estoppel, because, as was said in *Jorden v. Money* (1), a representation as to the future must be embodied as a contract or be nothing.

But what is the position in view of developments in the law in recent years? The law has not been standing still since *Jorden v. Money* (1). There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the courts have said that the promise must be honoured. The cases to which I particularly desire to refer are: *Fenner v. Blake* (2), *In re Wickham* (3), *Re William Porter & Co., Ltd.* (4) and *Buttery v. Pickard* (5). As I have said they are not cases of estoppel in the strict sense. They are really promises—promises intended to be binding, intended to be acted on, and in fact acted on. *Jorden v. Money* (1) can be distinguished, because there the promisor made it clear that she did not intend to be legally bound, whereas in the cases to which I refer the proper inference was that the promisor did intend to be bound. In each case the court held the promise to be binding on the party making it, even though under the old common law it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel. The decisions are a natural result of the fusion of law and equity: for the cases of *Hughes v. Metropolitan Ry. Co.* (6), *Birmingham and District Land Co. v. London & North Western Ry. Co.* (7) and *Salisbury (Marquess) v. Gilmore* (8), afford a suffi-

(1) (1854) 5 H. L. C. 185.

(2) [1900] 1 Q. B. 426.

(3) (1917) 34 T. L. R. 158.

(4) [1937] 2 All E. R. 361.

(5) [1946] W. N. 25.

(6) (1877) 2 App. Cas. 439, 448.

(7) (1888) 40 Ch. D. 268, 286.

(8) [1942] 2 K. B. 38, 51.

cient basis for saying that a party would not be allowed in equity to go back on such a promise. In my opinion, the time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration : and if the fusion of law and equity leads to this result, so much the better. That aspect was not considered in *Foakes v. Beer* (1). At this time of day however, when law and equity have been joined together for over seventy years, principles must be re-considered in the light of their combined effect. It is to be noticed that in the Sixth Interim Report of the Law Revision Committee, pars. 35, 40, it is recommended that such a promise as that to which I have referred, should be enforceable in law even though no consideration for it has been given by the promisee. It seems to me that, to the extent I have mentioned, that result has now been achieved by the decisions of the courts.

I am satisfied that a promise such as that to which I have referred is binding and the only question remaining for my consideration is the scope of the promise in the present case. I am satisfied on all the evidence that the promise here was that the ground rent should be reduced to £250l. a year as a temporary expedient while the block of flats was not fully, or substantially fully let, owing to the conditions prevailing. That means that the reduction in the rent applied throughout the years down to the end of 1944, but early in 1945 it is plain that the flats were fully let, and, indeed the rents received from them (many of them not being affected by the Rent Restrictions Acts), were increased beyond the figure at which it was originally contemplated that they would be let. At all events the rent from them must have been very considerable. I find that the conditions prevailing at the time when the reduction in rent was made, had completely passed away by the early months of 1945. I am satisfied that the promise was understood by all parties only to apply under the conditions prevailing at the time when it was made, namely, when the flats were only partially let, and that it did not extend any further than that. When the flats became fully let, early in 1945, the reduction ceased to apply.

In those circumstances, under the law as I hold it, it seems to me that rent is payable at the full rate for the quarters ending September 29 and December 25, 1945.

(1) (1884) 9 App. Cas. 605.

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If the case had been one of estoppel, it might be said that in any event the estoppel would cease when the conditions to which the representation applied came to an end, or it also might be said that it would only come to an end on notice. In either case it is only a way of ascertaining what is the scope of the representation. I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply. Here it was binding as covering the period down to the early part of 1945, and as from that time full rent is payable.

I therefore give judgment for the plaintiff company for the amount claimed.

Judgment for plaintiffs.

Solicitors for the plaintiffs: *Henry Boustred & Sons.*

Solicitors for the defendants: *Callingham, Griffith & Bates.*

P. B. D.

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Oct. 21, 23.

Wrottesley J.

DUFFIELD v. GREAT WESTERN RAILWAY COMPANY.

Emergency legislation—Essential work—Scheduled undertaking—Master and servant—Railway—Failure of employee to pass examination for promotion—Transference of employee to lower grade under term of service contract—Rate of wages payable—Essential Work (General Provisions) (No. 2), 1942 (St. R. & O. 1942, No. 1594), art. IV. (1.), (d).

An employee of the defendant railway company who, after three attempts, had failed to pass an examination for promotion to engine-driver, was reduced from the position of locomotive fireman to lower grade work with lower pay, in accordance with the terms of the company's conditions of service, of which the employee was aware. The employee, who had been in the service of the company since 1921, was willing to do the lower grade work but claimed that under art. IV. (1.) (d), of the Essential Work (General Provisions) (No. 2) Order, 1942 (1), he was entitled to be paid the higher wages of a fireman:—

(1) Essential Work (General Provisions) (No. 2) Order, 1942, art. IV. (1.) (d): "without pre- "judice to any terms and condi- "tions of employment more "favourable to persons employed "in the undertaking that may be "provided for by the Conditions	"of Employment and National "Arbitration Order, 1940, or by "that order as amended by any "subsequent order, the person "carrying on the undertaking shall "in respect of every prescribed "period pay to every specified "person (except as otherwise pro-
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Held, that art. IV. (1.) (d) did not apply to the case of a workman the nature of whose work had been changed in accordance with the terms of his contract of employment, and the plaintiff's claim therefore failed.

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ACTION tried by Wrottesley J.

The plaintiff Duffield, who had joined the Taff Vale Ry. Co. in 1920 as an engine cleaner, passed into the employment of the defendants, the Great Western Ry. Co., when the railway amalgamations were carried out under the Railways Act, 1921, and remained in their service as a locomotive fireman until 1943. In 1923, the company issued certain conditions of service to which the plaintiff agreed. The material condition as regards the present case provided that firemen should be entitled, in order of seniority, to be promoted engine-drivers if they could pass the necessary examination; but that if a fireman after three trials should fail to pass the examination he would be removed from the footplate and sent to other less well paid employment. The plaintiff had in fact failed in four attempts to pass the necessary examination for promotion, and in March, 1943, he was reduced to the position of a shed labourer, but later became a steam-raiser, whose wages, though higher than those of a shed labourer, were lower than that of a locomotive fireman. The plaintiff admitted that he could reasonably be asked by the railway company to do the lower grade work, but it was contended on his behalf that while doing that work he was entitled as a "specified person" under art. IV. (1.) (d) of the Essential Work (General Provisions) (No. 2) Order, 1942, to be paid the normal wages of his usual occupation—that of locomotive fireman. He therefore claimed the balance of wages which he alleged to be due.

Beney K.C. and *M. R. Nicholas* for plaintiff. The usual occupation of the plaintiff was that of a locomotive fireman, and being willing to perform service outside his usual occupation he was entitled to the normal wage of his usual occupation under para. (d). The term of the contract of service of railwaymen

"vided in this order) a sum which "is not less than the normal wage "for the prescribed period if that "person is during the normal "working hours—(i.) capable of "and available for work; and "(ii.) willing to perform any ser-	"vices outside his usual occupa- "tion which in the circumstances "he can reasonably be asked to "perform during any period when "work is not available for him in "his usual occupation in the "undertaking."
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on which the defendants rely only means that a fireman shall not be entitled to remain on the footplate if he fail to qualify for promotion. It does not compel him to serve in a lower grade for a lower wage. It would be a misuse of language to say that because a fireman has been reduced to a shed labourer his usual occupation is to be taken as that of shed labourer. The plaintiff could not leave his employment without the permission of the National Service Officer, and art. IV. of the order applies if he is willing to work and available for work. [*George v. Mitchell and King* (1) ; *Adrema, Ltd. v. Jenkinson* (2), cited.]

Sir Valentine Holmes K.C. and *J. P. Ashworth* for the defendants. Counsel for the plaintiff is forced to admit that para. (d) (ii.) of art. IV. does not apply literally to this case. It cannot be read as providing that a workman's wages are never to be lowered, although his contract of service provides for circumstances in which his wages may be lowered. This order creates a criminal offence and very clear language would be necessary in order to forbid an employer paying lower wages in accordance with the contract of service. No such words can be found in the order. Parliament has confined the maintenance of the rate of wages to the case of the man employed in a factory where there is not his usual work to do although he is available for work and willing to do work other than his normal work. The whole idea underlying art. IV. is that a man shall not stand idle because there does not happen to be work available for him in his normal occupation. It does not get rid of any contractual condition of service. *George v. Mitchell and King* (1) is a clear case and the decision of the Court of Appeal is obviously right.

Cur. adv. vult.

Oct. 23. WROTTESLEY J. stated the facts and continued : As to the plaintiff's legal position on removal there is not complete agreement between the parties. The railway company's view is that the plaintiff remained in their employment and must be found work elsewhere. On behalf of the plaintiff it was suggested that while he was entitled to be found work he could leave if he liked. The point is not of much practical importance because either side could give a seven-day notice to determine the employment. On the whole, I prefer the company's view, which was spoken to by Mr. Burgoyne and

(1) [1943] 59 T. L. R. 153.

(2) [1945] K. B. 447.

not challenged by the plaintiff. Incidentally, it is quite clear that this practice of the railway company was most salutary. If a man is unwilling or unable to qualify as an engine-driver he should not be permitted to block promotion by occupying the footplate, the only possible training ground. The practice was most strongly approved by the Associated Society of Locomotive Engineers and Firemen which was not, as it happens, the union to which this plaintiff belonged. Apart, therefore, from the order relied on by the plaintiff he has nothing to complain of in this case, for he was employed from his failure to pass the examination until these proceedings as a locomotive shed labourer, except that as opportunity offered he was promoted to the more responsible and higher paid work of steam-raiser. But when all this happened there had come into force the Essential Work (General Provisions) (No. 2) Order, 1942, and it is claimed by the plaintiff that by reason of the provisions of this order he is entitled to receive the higher rate of pay due to a fireman from the date of his removal from the footplate to the date of these proceedings, even though his work was in a lower grade and normally with a lower rate of pay.

It is common ground that the railway company's undertaking is a "scheduled undertaking" and the plaintiff a "specified person." I can therefore read the relevant provisions in art. IV. of the order: [His Lordship read the article, and continued:] Then there are definitions of "prescribed period," "normal working hours" and "normal wage" which I need not read. The relevant words are those which I have read in para. (d). The normal wage for the prescribed period of a fireman was greater than what was paid to the plaintiff by the amount claimed in the action. The question therefore arises whether this paragraph applies to this case. In the course of the argument Mr. Beney agreed that literally sub-para. (ii.) of para. (d) did not apply to the plaintiff. The paragraph only applies if two hypotheses are fulfilled: firstly, that he was capable of and available for work; and secondly, that he was willing to perform any services outside his usual occupation which in the circumstances he could reasonably be asked to perform during any period when work was not available for him in his usual occupation in the undertaking. The fact is that this paragraph and the whole order is directed to providing for matters set out in reg. 58A of the Defence (General) Regulations, 1939. It is in a general order called Control of Employment, and provides, amongst other things, by para. 4A that "The

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“ Minister may by order make provision for securing that
 “ enough workers are available in undertakings engaged in
 “ essential work and may in particular provide by any such
 “ order—(a) for securing that, except in circumstances and to
 “ the extent provided by the order, persons employed in any
 “ such undertaking shall continue to be employed in that
 “ undertaking, and shall not be caused to give their services in
 “ any other undertaking ; (b) for prohibiting persons so em-
 “ ployed from absenting themselves from work without reason-
 “ able excuse, or being persistently late in presenting themselves
 “ for work, or refusing to work reasonable overtime or to work
 “ at the times when they are required to work or to obey lawful
 “ orders in relation to their work, or impeding the work of the
 “ undertaking ”—and I now come to the most important one
 for the purpose of this case—“ (c) for requiring payment to
 “ persons so employed of wages for periods during which,
 “ though work is not available for them in their usual occupation,
 “ they are capable of and available for work, and willing to
 “ perform services which they can reasonably be asked to
 “ perform.”

In other words, the national interest might require that persons should be kept in their employment, even though for part or all of the time they could not be employed at their usual employment. In such a case they must obviously be paid, and obviously, too, they should not be idle if there were work to be done which they might reasonably be asked to do. For all such cases this art. IV. (1.) is apt. Under sub-para. (a) except by leave workmen may not be dismissed, but no breach of this sub-paragraph is or can be set up here. Nor, under (b), could they leave. Under (c) the notice had to be not less than one week. Under (d) we find dealt with the remuneration to be paid to persons who, though kept on, cannot be employed in their usual occupation. They must be fit and present and willing to do other reasonable work, and if all this is established they are to be paid as though they had worked full time and in their usual occupation, even though they had in fact done no work, or only worked part time.

As it appears to me, the fallacy in the case put forward by the plaintiff lies in attempting to apply these provisions to the case of a man, the nature of whose job was changed in accordance with the terms of his contract of employment. The order is not concerned with such a case. Of course, if the change of job were not in accordance with the terms of his contract, or were

such a change as to be a colourable transaction, and therefore in effect a termination of the employment, the courts could doubtless intervene, as was suggested by Humphreys J. in *Adrema, Ltd. v. Jenkinson* (1) in these words: "I am far from saying that there may not be circumstances which may arise in some case in which so great an alteration is made in the position of the employee by an order of his employers that it may be said that his position is impossible, that the effect of what is done by his employers is in effect to terminate his employment altogether" But there was nothing colourable in what happened here. On the other hand, there never was a period right down to the date of these proceedings when work in the plaintiff's real occupation in the locomotive shed was not available for him.

Since art. IV., para. (1.) (d), read literally, has a context to which it applies, and ample scope quite apart from the facts such as are found in this case, I see no reason for doing violence to the words of the para. (1.) (d) and reading it in the manner suggested by Mr. Beney; that is to say, suppressing the second hypothesis contained in (d) (ii.), or by reading other words into it. This part of the order does not deal with the rates of pay due to persons who perform an ordinary week's work, but only with persons for whom such work in their usual occupation cannot be found. In that context it is clear and sensible and gives effect to what is to be provided for under the Defence Regulations.

The only other authority, *George v. Mitchell and King* (2) is not directly in point; but the reasoning to be found in the judgments lays considerable stress on the fact that this order proceeds from and is superimposed on the contract, and only tears that contract up when the contract would otherwise contradict the order. This contract does nothing of the kind. Therefore, there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiff: *Pattinson & Brewer.*

Solicitor for defendants: *H. B. Gilmour.*

(1) [1945] K. B. 447, 450.

(2) 59 T. L. R. 153.

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DUFFIELD

v.

GREAT
WESTERN
RY. CO.

Wrottesley J.

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Oct. 22.

Morton,
Somervell and
Asquith L.JJ.*In re EMBLETON.*

County court—Money recovered by infant paid into court—Coming of age of infant—Application for payment out—Cesser of discretionary control of fund—County Courts Act, 1934 (24 & 25 Geo. 5, c. 53), s. 164.

Where money recovered by an infant is directed to be paid into the county court under s. 164 of the County Courts Act, 1934, to be applied or otherwise dealt with for the benefit of the infant, "as the county court in its discretion thinks fit," the discretionary control of the fund terminates on the infant's coming of age and the whole fund must be paid out to him on his application.

Johnston v. Henry Liston & Co. [1920] 1 K. B. 99 applied.

Per Morton L.J. It would seem logically to follow that the discretionary control of money recovered by a widow and directed to be paid into the county court under s. 164, sub-s. 3, would cease on the widow remarrying.

APPEAL from Middlesbrough county court.

On October 13, 1937, the applicant James Oakley Embleton, who was then seventeen years old and sued by his father as next friend, obtained judgment in respect of injury by accident for 2,250*l.* damages and costs against the United Automobile Services, Ltd. It was directed that, after payment of 10*l.* to the father, the balance of 2,240*l.* should be transferred to the Middlesbrough county court to be dealt with, subject to payment of certain extra costs, for the benefit of the applicant in such manner as the county court might in its discretion think fit. That order was made under s. 164 of the County Courts Act, 1934 (1). The applicant came of age on

- (1) The County Courts Act, 1934, s. 164 provides: "(1.) Where in any causes or matter in the King's Bench Division of the High Court . . . money is in any way recovered by or on behalf of, or adjudged or ordered to be paid to or for the benefit of, a person who is an infant or of unsound mind, the High Court or a judge thereof may order the money or any part thereof to be paid into or transferred to the county court of the district in which that person resides or another county court as the High Court or judge may order.
- (2.) On the making of any such order the money or the part thereof to which order relates shall be paid or transferred according to the order and shall . . . be invested, applied or otherwise dealt with for the benefit of the person to whom the order relates in such manner as the county court in its discretion thinks fit."
- (3.) The provisions of this section shall apply to money which in proceedings under the Fatal Accidents Acts, 1846 to 1908, is recovered by or adjudged or ordered to be paid to the widow of the person killed, as they apply to money recovered by or adjudged or ordered to be paid to an infant."

December 7, 1940, and an order was then made by the county court for payment of the interest on the fund in court to him half-yearly. In 1945 he applied for payment out of the whole fund for use in financing certain enterprises in the Birmingham district which a friend was proposing to undertake and also in buying land for his father to cultivate. The county court judge, after investigating the scheme, came to the conclusion that it was ill-considered and hazardous and contained no provision for the reasonable protection of the applicant's interest, and he refused the application. No further scheme was proposed but later the applicant applied for payment out to him of the whole fund on the ground that as he was of age, the discretionary control of the fund had come to an end. The county court judge refused the application. He said that reliance had been placed on *Johnston v. Henry Liston & Co.* (1), a case where it was held in reference to a lump sum paid into court under the Workmen's Compensation Act in settlement of an infant workman's claim that the discretionary control of the court under r. 53 of the Workmen's Compensation Rules ceased when the legal disability of the infant ceased. In the same case it was recognized that the legislature could by express words or necessary implication confer on the court a discretionary control over property in which a person of full age was interested as in respect of a lump sum paid in redemption of compensation under s. 13 of the Workmen's Compensation Act, 1925, in respect of an adult. In no case was an explicit limit placed on the duration of the control and s. 164, sub-s. 3, enabled money recovered by a widow to be paid into court. In his view there was no such limit. The applicant appealed.

J. Charlesworth for the applicant. The applicant was primarily entitled to the money recovered and the only reason that it was not paid to him was that he was an infant. That disability has ceased and he is now entitled to the fund. Section 164 gave control to the court only during his disability. It is true that sub-s. 3 enables money recovered by a widow under the Fatal Accidents Acts to be paid into the county court. If she ceased to be a widow, the control would, it is contended, cease. Sub-section 3 does not affect the construction of sub-ss. 1 and 2. *Johnston v. Henry Liston & Co.* (1) is directly in point though the money was paid in under

(1) [1920] 1 K. B. 99.

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a section of the Workmen's Compensation Act. It was followed in *Suffling v. J. Malcolm & Co.* (1), and should be applied in this case. Sub-section 3 does not afford a ground for a different construction.

MORTON L.J. This is an appeal from a decision of the county court judge refusing an application for the payment of a sum of money out of court. The applicant appeals, and there is no respondent. [His Lordship then stated the facts as to the payment into court and read the county courts Act, 1934, s. 164.] I pause to say that, apart from the provisions of that section and the orders which the learned judge thought fit to make under it, the sum now in question would have been the absolute property of the infant applicant. The applicant attained his majority on December 7, 1940, and shortly before that, by an Order of the county court dated October 30, 1940, it was provided that as from the end of the year 1940 the interest on the fund should be paid half-yearly to the plaintiff indefinitely. In 1945 the applicant applied to the county court that the whole of the fund should be paid out to him in order that it might be applied by him in financing certain enterprises and in buying certain land. The application came before the county court judge and he went into the question whether the proposed application of the money was shown to his satisfaction to be for the benefit of the applicant. He came to the conclusion that the proposed scheme was ill-considered and hazardous, and he refused to direct payment out unless a more satisfactory scheme was brought forward. The applicant did not put forward any further scheme, but subsequently he applied again for the payment out of the whole fund on the ground that, being of age, he was entitled to demand the payment out of the whole of the fund and that any discretionary control by the county court had come to an end. As I have said, the learned judge refused that application, taking the view that, on the true construction of s. 164 of the County Courts Act, he still had a discretion in the matter.

This point is not free from authority, because there are two decisions of this court in regard to a section in very similar terms. The first one is the case of *Johnston v. Henry Liston & Co.* (2). The relevant statutory provision in that case was r. 53 of the Workmen's Compensation Rules, and that rule

(1) (1933) 26 B. W. C. C. 537. (2) [1920] 1 K. B. 99.

provided: "Where an agreement is made for the payment
 "of a lump sum in lieu of a weekly payment to a person under
 "any legal disability, or for the redemption by a lump sum
 "of a weekly payment payable to a person under any legal
 "disability, and a memorandum thereof has been recorded in
 "accordance with the Act and these rules, such sum shall be
 "paid into court, and shall be invested, applied, or otherwise
 "dealt with by the court in such manner as the court in its
 "discretion thinks fit for the benefit of the person entitled
 "thereto." Subject to the observation which I shall make
 later on sub-s. 3 of the section now before us, I think there is
 no real distinction between the wording of s. 164 of the County
 Courts Act, 1934, and the working of the rule which I have just
 read. In each case the statutory provision, on the face of it,
 might be read as giving the county court a discretionary
 control over the fund in question for the life of the person
 entitled thereto. In giving the first judgment of the Court of
 Appeal, Warrington L.J., after stating the relevant facts,
 said: "Does then r. 53 enable a judge to retain the fund in
 "court when the person to whom it belongs is absolutely
 "entitled to it and is under no legal disability? The Act
 "could, of course, impose any restriction the legislature
 "thought fit on the right of a person of full age and not
 "otherwise under any disability to dispose as he pleases of his
 "own property, and some people may think it desirable to
 "maintain the condition of pupillage notwithstanding the
 "termination of the legal period of infancy, but in my opinion
 "the court ought not to be astute to discover such a restriction
 "of the rights of property, and ought not to hold it to be
 "imposed except by express words or by necessary implica-
 "tion. I can find nothing of the kind here. The words
 "'for the benefit of the person entitled to' seem to me to
 "mean for the benefit of a person already described—namely,
 "a person under legal disability, and I think that when that
 "disability ceases the discretion ceases also. Nothing remains
 "but the absolute title with the legal rights attached to it,
 "one of which is to have the fund paid to the owner." Subject
 to the matters to which I shall next refer, it seems to me that
 the reasoning of that judgment, although it was delivered in
 regard to another section, is directly applicable to the section
 which we have to construe. A similar decision was given by
 this court in the case of *Suffling v. J. Malcolm & Co.* (1) where

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the facts were, I think, quite indistinguishable from those in *Johnston v. Henry Liston & Co. (1)* and the court followed that case.

There is one possible distinction between the present case and *Johnston v. Henry Liston & Co. (1)*. In sub-s. 3 of s. 164, the provisions of the section are applied to money "adjudged" or ordered to be paid to the widow of the person killed." Now the widow of a person killed would not be a person under any legal disability and, therefore, the passage from Warrington L.J.'s judgment which I have already read would not apply verbatim to the case of a widow; but I think it would be drawing far too fine a distinction to say that the present case can be distinguished from *Johnston v. Henry Liston & Co. (1)* on that ground. I think the application of Warrington L.J.'s reasoning to the case of a widow would be this: "the words 'for the benefit of the person to whom the order relates' seem to me to mean for the benefit of a person already described—namely, a person who is the widow of the person killed, and when the person in question ceases to answer that description the discretion ceases also." Thus, if the widow remarried, she would be entitled to have the money paid out to her. That case is not before us, but it seems to me that this result must logically follow. If that is the true view, it seems to me that there is no valid distinction between the present case and the decisions of the Court of Appeal to which I have referred. The result is that this appeal should be allowed. The county court judge ought to have acceded to the application for payment out.

SOMERVELL L.J. : I agree.

ASQUITH L.J. : I agree.

Solicitors : *Cunliffe & Airy for Meek, Stubbs & Barnley, Middlesbrough.*

(1) [1920] 1 K. B. 99.

H. C. G.

SUTCLIFFE v. HOLMES

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Nov. 7.

Animals—Trespass—Sheep straying from common land on to land not adjoining it—Failure to fence the adjoining land—Whether duty to fence land not adjoining the common land—Liability of owners of sheep.

Morton,
Somervell and
Asquith L.JJ.

The plaintiff suffered from damage done by sheep of the defendants straying on to his lands. The defendants were commoners of Langfield Moor and properly allowed their sheep to graze on the moor. The plaintiff's lands were some distance from the moor and the sheep could only reach those lands from the moor by straying across land adjoining the moor belonging to a corporation and on to and along a highway. The defendants resisted the plaintiff's action for damages on the ground that if their sheep strayed on to the plaintiff's land it was due to the default of the plaintiff or the corporation in not fencing or maintaining in repair walls and fences between the plaintiff's lands and the moor, as the plaintiff or the corporation were by duty or prescription bound to do:—

Held (reversing the decision of the county court judge) (1.) that there was no evidence justifying a finding that the plaintiff's lands were originally enclosed from Langfield Moor; (2.) that there was a duty on the defendants grazing their sheep on unenclosed common to keep them off the land of another, unless it could be shown that this other had a duty to fence and that as there was no evidence that the plaintiff's lands were enclosed from Langfield Moor, there was no duty on him to fence from that moor; (3.) that a difficult question would have arisen, had there been this duty, whether it would have survived as against sheep on Langfield Moor after the plaintiff's lands ceased to be adjacent to it, there being authority that the duty could only be raised and exist as between adjacent land: see *Anon* (1496) *Keilway* 30, *King v. Rose* (1675) *Freeman*, K. B. 347 and *Dovaston v. Payne* (1795) 2 H. Bl. 527; and (4.) that even if there was a duty to fence the land of the corporation adjoining the moor over which the sheep passed, that did not afford the defendants a defence against the plaintiff, seeing that the defendants were aware of the alleged default of the corporation: General principle too widely stated in *Sharp v. Harvey* [1935] L. J. N. C. C. R. 261.

APPEAL from Todmorden county court.

The plaintiff James William Sutcliffe and the defendants Sam Holmes and Cecil Holmes were all farmers. The plaintiff suffered damage from sheep belonging to the defendants trespassing on his land at Hill Top Farm, Crumberhill Farm and Upper Lamb Farm and a meadow belonging to Cragg Hall, all at Cragg Vale, Mytholmrood, and brought proceedings against the defendants for 35*l.* 14*s.* 6*d.* damages and for an

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injunction to restrain the defendants from a continuance of the trespass. The sheep had been properly allowed to graze on Langfield Common by the defendants as commoners. The defendants' defence was that if (as was not admitted) their sheep entered upon the plaintiffs' land and caused damage, it was due to the default of the plaintiff or third parties in not fencing or maintaining in proper repair the wall or fences between the plaintiff's land and the common, as the plaintiff was or the third parties were by duty or prescription bound to do. Particulars of the walls and fences were the walls and fences of the farms and enclosures between Langfield Moor, Bellhouse Moor and the plaintiff's land, these farms and enclosures mainly belonging to the Morley Corporation and consisting of land enclosed from these moors. The county court judge said he was satisfied that sheep belonging to the defendants (although mainly of the second defendant) had trespassed on the plaintiff's land and done damage which he assessed at 25*l*. The substantial defence was that the defendants were under no liability for these trespasses. He was satisfied that the properties now owned or occupied by the plaintiff were formerly part of the common of Errington and district. Further, he was satisfied that when these enclosures were made it would be a term of the enclosure award or awards that those to whom the enclosures were granted should fence them against the common or commons surrounding the enclosures. Apart from such a finding of fact, the decision of Cockburn C.J. in *Barber v. Whiteley* (1) justified his holding that as a matter of law in the absence of any evidence to the contrary a person who owned land enclosed from a common or waste was under an obligation to fence as against the common and the commoners. Any other rule would deny the commoners their rights, since it would be impracticable for them to fence the whole common. Cockburn C.J.'s decision was in his view founded on common sense. There would be judgment for the defendants with costs. The plaintiff appealed.

There was evidence that sheep straying from Langfield Moor could only reach the plaintiff's lands by straying across land of Morley Corporation which had been in a derelict condition since 1894 on to a highway and along the highway direct to the plaintiff's lands or through lands of an adjoining occupier. The other material evidence of fact is stated in Somervell L.J.'s judgment.

(1) (1865) 34 L. J. (Q. B.) 212.

W. K. Carter for the plaintiff. The county court judge ought not to have held it the plaintiff's duty to fence his land. There is no evidence that the plaintiff's land was ever enclosed from common or moorland. In a plan of the area dated 1839 Cragg Hall does not appear as common land. Anyone who brings on to land animals which cause damage must do so at his peril : *Rylands v. Fletcher* (1) ; *Barber v. Whiteley* (2) ; the case relied on by the county court judge relates to the position as between adjoining owners and not as between common land and an owner of land, especially when the land is some distance away. Even if the plaintiff's land was enclosed from Langfield Moor, the general principle applies that when sheep do damage their owner is liable, unless the owner of the land on to which the sheep strayed was under a duty to fence : *Park v. J. Jobson & Co.* (3), and the obligation to fence only applies against the contiguous land and certainly not to moorland some distance away : Glanville Williams on Animals, p. 214. That author points out that the duty to fence so as to keep cattle or sheep out can only arise from prescription or lost grant. Unless these defendants can prove the plaintiff's duty to fence they cannot succeed. In any case the obligation to fence does not extend beyond the adjoining close : *Right v. Baynard* (4) and see Halsbury's Laws of England, vol. 3 (2nd ed.), p. 155 and Glanville Williams on Liability for Animals, pp. 221, 223. Cattle or sheep must be lawfully in the place from which they pass on to land not properly fenced and cause damage : *Dovaston v. Payne* (5) ; *Manchester, Sheffield and Lincolnshire Ry. Co. v. Wallis* (6). If the plaintiff's land had been on the boundary of Langfield Common the defendants might have had a case, but in fact the common was bounded by land of the Morley Corporation which has been derelict since 1894 and which to the defendants' knowledge was not fenced. Therefore the duty was on the shepherds to prevent straying. Actually the sheep must have crossed Morley Corporation land on to a highway along which they reached the plaintiff's land. It would be a great injustice to people owning this land or other land distant from the moor if the judge's decision was held to be right.

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E. M. Holland for the defendants. This case raises questions

(1) (1866) L. R. 1 Ex. 265.

(4) (1674) Freem. K. B. 379.

(2) 34 L. J. (Q. B.) 212.

(5) (1795) 2 H. Bl. 527.

(3) [1945] 1 All E. R. 222, 225.

(6) (1854) 14 C. B. 213.

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of considerable importance. It has been contended that *Barber v. Whiteley* (1) does not decide that land enclosed from common land carries with it an obligation to fence. It would impose a heavy burden on commoners if they were compelled to keep their sheep or cattle off adjoining private land enclosed from the common. That the duty to fence is on the person becoming possessed of such enclosed land is made clear in Hunt on Boundaries and Fences, 6th ed., p. 98, and it is there shown that *Barber v. Whiteley* (1) establishes prima facie an obligation to fence enclosed land: see also *Swift v. Ellis* (2), Year Book, 20 Edw. 4 (1480), Folio 10 and *Parr v. J. Jobson & Co.* (3). So far fences bounding the common are under consideration and the county court judge has found that the plaintiff's properties were originally part of common land. The documentary evidence in this case suggests that the enclosures were far earlier than the Enclosure Act: see abstract of a feoffment dated in 1638 and the statement indicating an earlier enclosure in the Enclosure Award of 1849, which is evidence as being a statement by a public official in an official document. Again it was the neglect of the Morley Corporation in failing to maintain walls and fences that let the defendants' sheep stray on to the plaintiff's land and the defendants are not therefore liable: Glanville Williams on Liability for Animals, pp. 181, 220. If B is under a duty to fence against A but C is under no duty to fence against B, C cannot sue A if his animals stray on to C's land causing damage.

[SOMERVELL L.J. If the commoners, knowing of the Morley Corporation's default, do not take proceedings, why should that deprive the owner of land adjoining the Morley Corporation land of his right to sue the commoner whose sheep stray on to his land?]

Part of the commoners' grazing rights have been taken away by enclosures and surely it is for the owners of the enclosures to protect themselves. If peril is caused by the Morley Corporation's failure to fence, ought not the plaintiff to have fenced?

[He referred to *Sharp v. Harvey* (4) and *Smith v. Great Western Ry. Co.* (5).]

W. K. Carter replied and contended that *Sharp v. Harvey* (4) was wrongly decided.

Cur. adv. vult.

(1) 34 L. J. (Q. B.) 212.

(4) [1935] L. J. N. C. C. R. 261.

(2) [1939] L. J. N. C. C. R. 384.

(5) (1926) 42 T. L. R. 321.

(3) [1945] 1 All E. R. 222.

Nov. 7. MORTON L.J. I have read the judgment that is about to be delivered by Somervell L.J., and I agree with it. Asquith L.J., has asked me to say he also agrees with it.

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SOMERVELL L.J. read the following judgment. This was a claim by the plaintiff for damage done to his land by sheep belonging to the defendants trespassing on his land. The learned county court judge held that damage to the extent of 25*l.* had been done by sheep belonging to the two defendants which were trespassing on the plaintiff's land. He dismissed the claim on the ground that the properties owned or occupied by the plaintiff were formerly part of the "commons of Erringdon and district," and that "it would be a term of the enclosure awards that those to whom the enclosures were granted should fence against the common or commons surrounding the enclosures." He based this latter conclusion not, I think, on any express evidence of the terms of the enclosures, but as an implication he was entitled or bound to draw in law by reason of the decision in *Barber v. Whiteley* (1).

The case as argued before us raises difficult questions of fact and of law. I will deal first with the facts. No enclosure award was produced or traced dealing with the plaintiff's lands. It is clear on the evidence and common ground before us that the defendants' sheep came from Langfield Moor on which both defendants had a right, in common with others, to pasture sheep. Langfield Moor is about a mile from the plaintiff's property. In between, starting from Langfield Moor, was a considerable area of land belonging to the Morley Corporation. There was access to this land from the moor and across it; the land was said to be derelict and the walls had not been attended to since 1894. From where the Morley Corporation land ended the sheep proceeded along a road and from the road direct to the plaintiff's lands or through lands of an adjoining occupier.

Mr. Milner Holland, for the defendants, submitted that there was evidence to support the finding that the plaintiff's land was formerly part of the commons of Erringdon and district and that if there was any evidence this court would not interfere. He relied on an Abstract of Feoffment of 1628, an extract from the Erringdon Valuation Book of 1828, a Conveyance of 1845, extracts from the Sowerby and Soyland Enclosure Award of 1849, and a conveyance of 1858. These must, he submitted,

(1) 34 L. J. (Q. B.) 212.

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be read in the light of the fact, as shown by the ordnance map, that the lands to-day enclosed, including the plaintiff's land, are surrounded by moors from which it might reasonably be presumed they had been enclosed. It is unnecessary to go through the documents in detail. Admittedly, there are no statements clearly referable to the plaintiff's lands. The documents show that there had been enclosures from these moors from early times. There are references to "old enclosures" as descriptive of land near (and possibly including) the plaintiff's lands. Mr. Holland also relied on some passages in the learned judge's note of the oral evidence which again were of a very general character. Counsel for the plaintiff, Mr. Carter, raised no objection to our regarding any statements in these documents as evidence. He submitted that to show there had been a number of enclosures from moors was not in itself any evidence that the plaintiff's lands had been enclosed from moors. He further submitted that there was no evidence that the plaintiff's land had been enclosed from Langfield Moor. I take the view that there was some, though very slight, evidence that the plaintiff's land had been enclosed from some moor on which at the time there were probably grazing rights. In my view there was no evidence on which a court could find, and the learned judge did not purport so to find, that the plaintiff's lands were enclosed from Langfield Moor, and the general lie of the land, as shown by the ordnance map, make it more probable that if enclosed from a moor, it would be from Bellhouse Moor.

Before considering the law, it is convenient to state the defendants' main alternative point, which may be stated as follows: Whatever the origin of the enclosure of the plaintiff's land, the Morley Corporation land clearly was enclosed from Langfield Moor; in law they were under an obligation to fence against Langfield Moor; and their failure to fence was a wrongful act or default causing the trespass and affording a good defence to the plaintiff's claim.

The owner of livestock is, according to English law, under a duty to keep them from straying on to the land of others. The duty is not absolute, but it is more than a duty not to be negligent: see *Rylands v. Fletcher* (1). The party damaged had from early times an action of "cattle-trespass." That this duty falls on those who pasture sheep on a common was laid down in a case reported in the Year Book, 20 Edward IV., Michaelmas Term, Folio 10, and referred to by Blackburn J.

(1) L. R. 1 Ex. 265, 280 to 282.

in the above passage in *Rylands v. Fletcher* (1) and by Willes J. in *Read v. Edwards* (2), where a translation of the report is set out in a note. The defence was that the defendant's sheep were on a common, that the plaintiff's close adjoined the common, that the sheep entered without the defendant's knowledge, and that immediately the defendant knew what had happened he drove the sheep out. Brian C.J., with him Littleton J. agreed, held that this plea was bad as, the common being unenclosed, the defendant "ought to keep his beasts in the common and out of the land of another." It is, however, a defence available to a defendant that the plaintiff was under a duty to fence. I will consider, first, the case where the plaintiff's land adjoins the defendant's land from which the cattle escaped. The principle is illustrated in the case of *Barber v. Whiteley* (3), to which the learned judge referred and relied on as stated above. The plaintiff's sheep had strayed on to the defendant's land and the defendant had taken the sheep, claiming to be entitled to do so under the right of distress damage feasant. If the defendant was under a duty to fence as against the plaintiff, this defeated his right of distress, as it would have defeated a claim for cattle-trespass against the plaintiff. The defendant's farm was land enclosed from the waste of a manor, under an ancient grant from the lord of the manor. Animals were at that time grazed on the waste. The plaintiff's land was an adjacent part of the original waste enclosed under a later enclosure award. There was evidence that the owners and occupiers of the defendant's farm had repaired the fence prior to and after the enclosure of the plaintiff's farm and down to two years before the events in issue. The court did not regard this last evidence as in itself decisive, though they attached great weight to it. They relied also on the probability of the lord attaching a duty to fence to the original grant allowing the enclosure of the defendant's farm. Cockburn C.J. said (4): "Now the very purpose of enclosing lands by the lord must have been that the land should be used as cultivated land, and since such a use, beneficial to the owner alone, makes it necessary that the land should be protected from grazing animals, it is more likely that the lord would enforce the obligation of keeping up a fence and so preventing a trespass on the person whom he had allowed to enclose than on the other tenants of the

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(1) L. R. 1 Ex. 265, 280 to 282. (3) 34 L. J. (Q. B.) 212.

(2) (1864) 34 L. J. (C. P.) 30, 32. (4) Ibid. 216.

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"manor, who had rights of common over the waste which they
 "could have exercised before the enclosure without being
 "subject to the risk of having their cattle distrained for
 "trespassing, and who would be, moreover, a varying and
 "fluctuating body."

The first defence put forward must be on the basis that the plaintiff was under a duty to fence as against Langfield Moor, and it is sufficient to say that in my opinion there is no evidence that the plaintiff's farm was enclosed from Langfield Moor. If it had been so enclosed and originally adjacent to the moor, a difficult question would have arisen as to whether this duty survived as against the owners of sheep on Langfield Moor, the plaintiff's land no longer being adjacent to the moor. There is authority for the proposition that the duty to fence can only be raised and exist as between adjacent lands: see Brian C.J. in *Anon* (1), *King v. Rose* (2). Though the facts were somewhat different, this principle is affirmed by Heath J. in *Dovaston v. Payne* (3). It seems to me to follow from these and other authorities that the situation of the plaintiff's lands in relation to Langfield Moor would, on any view, be an answer to this defence. It is necessary now to consider Mr. Holland's alternative argument already set out, which is independent of whether the plaintiff's land was originally enclosed from a common. The first question is whether there is evidence that the Morley Corporation were under a duty to fence as against Langfield Moor. I am prepared to assume on the evidence that the Morley Corporation land was enclosed from Langfield Moor. If one contrasts the facts of the present case with the facts in *Barber v. Whiteley* (4), the evidence here as to actual maintenance is very weak. The walls had not been maintained since 1894. This is relevant on a later point, but I am prepared to assume that the duty to fence can be implied on the grounds set out by Cockburn C.J. in the case cited. Is the wrongful act of a third party a defence to an action of cattle-trespass? The old authorities and dicta are conflicting as to whether the wrongful act of a third party is a defence. In *Smith v. Stone* (5), Roll C.J. said: "He that drives my cattle into another man's land is the trespasser against him, and not I who am the owner of the cattle." On the other hand, the same judge said in

(1) (1496) *Keilway* 30; 72 (3) 2 H. Bl. 527.

E. R. 186. (4) 34 L. J. (Q. B.) 212.

(2) (1673) *Freem. K. B.* 347; 89 (5) (1647) *Style* 65; 82 E. R.

E. R. 258. 533.

Topladye v. Stalye (1): "If cattle be stolen and put into my ground, I may take them damage feasant or bring an action of trespass against the owner." Mr. Holland referred to *Smith v. Great Western Ry. Co.* (2), as a case where a defendant successfully pleaded the act of a third party as a defence to a claim based on the *Rylands v. Fletcher* (3) principle. The judgment of the Court of Exchequer Chamber in the latter case, which was affirmed and approved in the House of Lords, as appears from the passage already referred to in this judgment, applied the general principles of cattle-trespass to a reservoir from which water had escaped causing damage. In *Smith v. Great Western Ry. Co.* (2) oil escaped from a tank sent in a defective condition by the defendant oil company to the defendant railway company for carriage. Avory J. held the oil company liable and the railway company not liable, adopting what was said by Lord Moulton in a Privy Council appeal, *Rickards v. Lothian* (4). In the latter case, Lord Moulton was dealing with the malicious act of a third person which the defendant could not reasonably have foreseen or provided against. Avory J. found that the railway company were ignorant of the defect in the tank entrusted to them, and, as soon as they discovered it, took immediate steps to remedy it. The reasoning in both cases seems to me to be based on findings that the defendant was unaware of the act or default at the time, was guilty of no negligence in being unaware of it, and could not reasonably have foreseen and guarded against it or its consequences. If this is right, it cannot avail the defendants in the present case. The defendants were well aware of the alleged default by the Morley Corporation in not fencing against the moor, as this state of affairs had existed for years. Steps could have been taken in the matter. It was not suggested that any steps had been taken by the defendants or other commoners to enforce the rights which it is claimed the commoners have against the Morley Corporation. It is unnecessary to consider the form in which these rights could be enforced, but I can think of more than one method by which, assuming they exist, they could be effectively exercised. Having acquiesced in the failure to fence, it seems to me it was their duty to see that the sheep did not escape as laid down in the above cited case in the Year Book, 20 Edward IV.

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(1) (1649) Style 165; 82 (3) L. R. 1 Ex. 265
 E. R. 615. (4) [1913] A. C. 263.
 (2) 42 T. L. R. 391.

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Mr. Holland put the same point in a somewhat different way. One may simplify the facts of this case by considering three holdings, A's adjoining B's, and B's adjoining C's. B is under a duty to fence against A, but C is under no duty to fence against B. Through B's default, A's cattle come from his land through B's on to C's. Mr. Holland submitted that C should be entitled to sue B, in negligence, A. being freed from liability. He adopted as part of his argument the reasoning on this issue set out in Mr. Glanville Williams's Book on Liability for Animals, at p. 223. He admitted that such authority and dicta as existed were against him. The argument is mainly based on the suggestion that to allow C to sue B avoids circuity of action. There are, however, many cases in which a defendant sued and liable may have a right of recourse over against a third party. This is in itself no reason for holding that the third party is directly liable. So to hold, on the facts as set out above, would be to treat the duty to fence as against A as a duty owed to C. This is inconsistent with the authorities already cited and I see no grounds in principle in favour of it. It is, therefore, unnecessary to consider whether, having regard to the fact that the plaintiff's land did not directly abut on the corporation's land, he could, on any view, have invoked this principle. Our attention was drawn to the case of *Sharp v. Harvey* (1), a decision of His Honour Judge Wethered. In that case the learned judge found that some of the defendant's sheep had escaped from a common through defective fences on to A.'s field, which abutted on the common, and thence on to the plaintiff's farm causing damage. He held that A's failure to keep up his fences was the breach of a duty to maintain fair fences against the common. In the course of a careful judgment, with most of which I agree, he laid down as a general principle that, if the defendant's animals enter the plaintiff's land owing to the wrongful act of a third party, the defendant is not liable. For the reasons I have given, I think this is too broadly stated. The learned judge should, I think, have considered the question whether the defendant knew or ought to have known of the defect and ought to have taken steps to have it remedied or seen that the sheep did not escape as a result of it.

For these reasons, I think the appeal must be allowed and judgment should be entered for the plaintiff for 25*l.* damages with costs here and below. I think the learned county court judge was wrong in not realizing, on the basis on which he

(1) [1935 L. J. N. C. C. R. 261.

decided in the defendants' favour, that there must be evidence that the plaintiff's land was enclosed from Langfield Moor. The alternative points on which the defendants sought to support the judgment have been dealt with.

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Appeal allowed.

Liberty for the plaintiff to apply for an injunction.

Solicitors: *Williamson, Hill & Co. for Eastwoods, Sutcliffes, Sager & Gledhill, Hebden Bridge; Preston, Lane-Claypon & O'Kelly for Waddington & Son, Burnley.*

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Landlord and tenant—Rent restriction—Statutory tenancy—Breach of covenant in original lease—Intention to continue breach—Action for possession—Medical evidence that breach necessary for tenant's health—Refusal of order—Reasonableness—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 15, sub-s. 1—Rent Restrictions and Mortgage Interest (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32), s. 3, sub-s. 1, Sch. I.

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Somervell and
Asquith L.JJ.

The statutory tenant of a flat kept a dog on the premises in breach of a covenant in the original lease, and when requested to remove it, said that it was necessary to her health to have a dog, and that with no desire to flout the landlord's regulations, she intended to continue keeping it. In an action by the landlords for possession medical evidence was given that the defendant had been in a nervous condition after a burglary at the flat, and had been advised to get a dog; after which her health had much improved, but was likely to deteriorate if she were deprived of the dog. The judge held that in the circumstances it would not be reasonable to make an order for possession:—

Held, that while the circumstances in which such an order would be justified must be very exceptional it was too wide a proposition to say that it could never be reasonable not to make an order if the breach was being deliberately continued by the defendant. In the present case the court was satisfied that the county court judge had taken into account (as he was bound to do) the threatened continuance of the breach, as one of the relevant circumstances; that being so there was no ground on which the court could interfere with his exercise of the very wide discretion given by the Rent Restriction Acts.

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APPEAL from Bloomsbury county court.

By a lease, dated December 27, 1940, Bell Investment Trust, Ltd. (whose name was later changed to Bell London and Provincial Properties, Ltd.) let to the defendant, Mrs. Reuben, a flat 135, Park West, Marble Arch, W.2, at a rent of 145*l.* per annum, from December 25, 1940, for six months, and thereafter from month to month until either party should give to the other one month's notice in writing. The defendant covenanted to observe the regulations made by the plaintiffs for the management of the flats, and set out in the schedule to the lease, one of which provided: "No dog . . . shall be kept in any flat "without the permission of the landlords." The rateable value of the flat was less than 100*l.*, and the Rent Restriction Acts therefore applied to it.

On February 7, 1945, the plaintiffs wrote to the defendant that complaint had been made to them of the barking of a dog in her flat, and requiring its removal within twenty-four hours, and on February 15; the plaintiffs' solicitors wrote threatening proceedings if the dog was not removed within seven days. The dog had in fact been removed on the 9th, and the plaintiffs were so informed. On February 28, the defendant's solicitors wrote to the plaintiffs' solicitors in the following terms: "Our client instructs us that the dog referred to in your clients' "letter of February 7 was removed immediately the letter was "received from your clients, and there can therefore be no "further complaint on this score. The position, however, is "that our client is most anxious to have a dog in the flat. "The reason for this is that there has been a recent burglary "at her flat, as a result of which she lost a substantial amount "of property. The effect of the burglary has been to cause our "client's nerves to be seriously affected. She is now under "regular medical attention and it is felt that if she were "permitted to have a dog upon the premises this would reassure "her and have a beneficial effect upon her health. We can, if "you so desire, obtain and let you have confirmation of this "from our client's doctor. It is appreciated that your clients, "as landlords of the property, are anxious that no tenant shall "commit a nuisance. If, therefore, permission is granted to "our client, she would undertake to have only a properly trained "dog, and, in the unlikely event of any further complaints "being received, she would undertake to have the dog removed "forthwith. We feel that this is a case where your clients "ought to relax their regulations and permit our client to keep a

" dog, particularly in view of the fact that there would appear
 " to be a number of tenants of these flats who in fact, do keep
 " dogs."

The plaintiffs' solicitors replied on March 1: " Although we
 " feel sure our clients would appreciate the reason for the
 " request to keep a dog, we think we should tell you that
 " after giving the question of dogs their most careful consider-
 " ation, our clients some little time ago came to the conclusion
 " that they could not have dogs in any of their blocks of flats.
 " You will appreciate that while some owners take every care
 " with regard to their animals, others are not so careful, and
 " attempts to deal with the matter by discriminating have
 " proved a failure, and our clients have therefore been compelled
 " to enforce the rule that no dogs would be allowed. You
 " may take it that, through ourselves, our clients are at the
 " moment engaged on ensuring that all dogs are removed from
 " the premises, although, as you will understand, this takes
 " some time."

On June 18, 1945, the plaintiffs' solicitors wrote to the defend-
 ant complaining that there was again a dog in the flat, and
 threatening proceedings if it was not removed. To this letter
 the defendant's solicitors replied, reminding them of the
 earlier correspondence and continuing: " The dog in question
 " is a small one, has been perfectly trained, and our client assures
 " us it has not given any offence to any of the other tenants in
 " the building. The presence of the dog in the flat is necessary
 " to our client's health. Our client does not wish your clients
 " to feel that she is in any way flouting your clients' rules, but
 " the presence of a dog in the flat has proved so necessary for
 " her well-being that she feels she cannot be without it, and in
 " these circumstances she intends to keep the dog even though
 " she appreciates that she may involve herself in proceedings.
 " We trust, however, that your clients will see fit not to take
 " any proceedings." The plaintiffs felt unable to make any
 exception to their rule as to dogs, and, after some further
 correspondence, on November 5, 1945, they gave notice deter-
 mining the defendant's tenancy on December 31, 1945, and
 thereafter she remained in possession as a statutory tenant.
 The plaintiffs brought an action for possession in the Blooms-
 bury county court on the ground of breach of covenant. The
 defendant admitted the breach and that it was her intention to
 continue the breach, and called a doctor who said that owing to
 her nervous state of health after the burglary he had advised

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her to keep a dog : that her condition had improved when she had the first dog in February, had deteriorated when she got rid of it, and had again improved since she had got the second dog. If she did not have one she would become depressed and lose weight. The county court judge found that in the circumstances proved it would not be reasonable to make an order for possession in respect of the breach of covenant up to that date. Section 3, sub-s. 1 of the Rent Restrictions and Mortgage Interest (Amendment) Act, 1933 (1) gave a discretion, notwithstanding s. 15 of the Increase of Rent and Mortgage Interest Restrictions Act, 1920 (1). He added : " I do not say anything " about any possible future breach." He gave judgment for the defendant, and the plaintiffs appealed.

Lionel Edwards for the plaintiffs. The appellants come to the court with the simple and fundamental proposition that a covenant solemnly entered into, and now incorporated by the provisions of the Act in the statutory tenancy, should be observed, and that litigants who come and say that they have not observed, and do not intend to observe, their covenants should not receive the protection of the Acts. This intention is plainly expressed in s. 15 of the Act of 1920, and the discretion

(1) Rent Restrictions and Mortgage Interest (Amendment) Act, 1933, s. 3, sub-s. 1 : " No " order or judgment for the re- " covery of possession of any " dwelling-house to which the " principal Acts apply or for the " ejectment of a tenant therefrom " shall be made or given unless the " court considers it reasonable to " make such an order or give such " a judgment, and either (a) the " court has power so to do under " the provisions set out in the " First Schedule to this Act ; " or "

Schedule I. : " A court shall, " for the purposes of s. 3 of this " Act, have power to make or give " an order or judgment for the " recovery of possession of any " dwelling-house to which the " principal Acts apply or for the " ejectment of a tenant therefrom " without proof of suitable alter-

" native accommodation (where " the court considers it reasonable " so to do) if (a) any rent lawfully " due from the tenant has not been " paid, or any other obligation of " the tenancy (whether under the " contract of tenancy or under the " principal Acts) so far as the " obligation is consistent with the " provisions of the principal Acts " has been broken or not per- " formed."

Increase of Rent and Mortgage Interest Restrictions Act, 1920, s. 15, sub-s. 1 : " A tenant who " by virtue of the provisions of " this Act retains possession of any " dwelling-house to which this Act " applies shall, so long as he " retains possession, observe and " be entitled to the benefit of all " the terms and conditions of the " original contract of tenancy, so " far as the same are consistent " with the provisions of this Act."

given to the court by s. 3 of the Act of 1933 does not extend to authorizing a continuance of a breach of the statutory conditions. It is submitted that the county court judge went outside the scope of his discretion, and alternatively, that he exercised it on a wrong principle. As to the first point he could only have exercised his discretion as he did by holding that the provision in the lease about dogs was unreasonable, but as that provision now had the authority of an Act of Parliament, it was not open to him so to hold. Alternatively, he could only have exercised his discretion as he did by not taking into account the expressed intention of the defendant to go on breaking her obligations, and that was a material fact which he ought to have taken into account. In failing to do so he exercised his discretion on a wrong principle. [He referred to *Kelly v. White* : *Penn Gaskell v. Roberts* (1).] There is no case in the books in which a person has been relieved from forfeiture where it is clear that he intends to continue the breach. Cases under s. 146, sub-s. 2, of the Law of Property Act, 1925, or the earlier Acts which it has replaced, though not directly in point, illustrate the principles applied by the court : see, for instance *Rose v. Spicer* (2), *Batson v. School Board for London* (3) where the court granted relief but said that they could not condone a future breach ; *Angell v. Burn* (4).

Hallis for the defendant. The first ground of appeal is no more than an invitation to this court to substitute its decision for that of the learned judge, which the court will not do unless the judge has exercised his discretion on wrong principles. [He referred to *Pickford v. Mace* (5).] Section 3 of the Act of 1933 lays down an overriding condition of reasonableness. What the judge has to consider on the issue of reasonableness has been the subject of judicial decision in *Cumming v. Danson* (6). There have been many cases where there has been a breach of covenant and it is clear that the breach will continue. Cases under s. 146 of the Law of Property Act are rather a contrast than an analogy. Section 146 assumes the landlord's right to possession under a contractual tenancy, but offers the tenant relief from the consequences of his breach on certain conditions. If he says " I intend to go on committing the

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(1) [1920] W. N. 220.

(3) (1904) 69 J. P. 9.

(2) [1911] 2 K. B. 234 ; in H. L.

(4) (1933) 77 Sol. J. 337.

sub. nom. *Hyman v. Rose* [1912]

(5) [1943] 1 K. B. 623.

A. C. 623.

(6) (1942) 59 T. L. R. 70.

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"breach," he does not comply with the conditions. Section 3 of the Act of 1933, by contrast assumes the tenant's right to remain in possession, but allows the landlord to eject him for breach of covenant if—and only if—the court thinks it reasonable, a provision clearly intended to prevent tenants being turned out for technical or harmless breaches. In the present case it is submitted that the judge did take into account all relevant circumstances in the "broad commonsense way," referred to by Lord Greene M.R., in *Cumming v. Danson* (1). He must have had present to his mind the fact that the defendant intended to continue in breach of the covenant. He has exercised his discretion on right principles, and this court ought not to interfere.

MORTON L.J. In this case the learned county court judge, Judge Konstam, refused an order which the plaintiffs sought for possession of a flat No. 135, Park West, Marble Arch. The plaintiffs are the lessors and the defendant is the tenant of this flat.

[After stating the facts his Lordship continued:] I have arrived at the conclusion, for reasons which I shall state shortly that it would not be right for this court to interfere with the decision; but I wish to say at once that I hope that no tenant of a flat in that building, or in any other building, will treat anything I say as an encouragement to break any covenant. This covenant against keeping a dog without the permission of the landlord is, it seems to me, perfectly reasonable. It is only in a very special case indeed that the court could properly refuse to give the landlord possession if a tenant broke that covenant and insisted on breaking it. As a rule (and it is a rule with very few exceptions indeed) it would, in my opinion be right to grant the landlord possession if the tenant knowingly breaks a covenant and says "and I intend to go on breaking it."

What are the circumstances of the present case? The learned judge has carefully confined himself to the breach of covenant up to the date of the hearing. Mr. Edwards, for the plaintiffs, suggested that he had left out of account altogether the expressed intention of the defendant to continue keeping the dog. I do not draw that conclusion at all. I think, reading his notes and having regard to the fact that the threat had been very prominently brought before his attention, the judge did take into account that this lady said: "I cannot do without a dog, and I am going to continue to keep a dog." I think his

attitude of mind was probably this, if I might hazard a guess from what he has said: "At the moment I do not think it would be reasonable to make an order for possession. What has taken place up to the present, including the observation of the lady that she could not do without the dog and would go on keeping it, is not a sufficient reason for giving the landlord possession in all the circumstances of this case." Then he goes on to safeguard the position by saying: "Of course, I do not say anything about any possible future breach." I think the learned judge may well have thought that the lady, having shown a reasonable spirit, would part with the dog if and when it became no longer necessary. Her state of health might, of course, improve. The learned judge may also have thought that the present state of affairs might continue so long that it would no longer be reasonable to keep the plaintiffs out of possession. Another circumstance which may have influenced the mind of the judge is, that the plaintiffs did not bring forward any evidence that the presence of this dog in the defendant's flat had given rise to any complaints or to any untoward events. The learned judge has based himself only upon the state of facts at the date of the hearing and I think he was right in so doing.

In the case of *Cumming v. Danson* (1), the Master of the Rolls said this: "In considering reasonableness under s. 3, sub-s. 1, it is, in my opinion, perfectly clear that the duty of the judge was to take into account all relevant circumstances as they existed at the date of the hearing. That he must do in what I venture to call a broad, commonsense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matters which he ought to take into account."

I should be most reluctant to fetter in any way the very wide discretion which is given by this Act to a county court judge—and, be it observed, it is clearly contemplated by s. 3, sub-s. 1, and the scheduled provisions which I have read that a county court judge may refuse to give possession even although a covenant has been broken. If an obligation of the tenant has been broken the county court judge has still this discretion and he is only to exercise it in favour of the landlord if he considers it reasonable so to do. For my part I cannot find that in this

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case the county court judge in any way misdirected himself or acted on a wrong principle or omitted to take into consideration some fact which he ought to have considered. It certainly is a very strong line to take, to refuse possession to a landlord in these circumstances, but I cannot say that the learned county court judge was not justified in exercising his discretion in this way.

I think, possibly, if I had been trying the case, I might have inserted some safeguard for the assistance of the landlords; for example (though I have not thought out the exact form of words) I might have ordered that possession should be given but that the order should not take effect so long as the lady satisfied the landlords, perhaps monthly or every two months, by some medical certificate, that her health still required the presence of the dog. That, I think, might have been a fair safeguard from the standpoint of the landlords, who at the moment are placed in rather a difficult position; but I cannot say that there are any grounds upon which we can interfere with the judge's exercise of his discretion.

We were referred to a number of cases dealing with relief from forfeiture under s. 146, sub-s. 2, of the Law of Property Act, 1925, and the Acts which preceded that Act, dealing with the same subject matter. These cases may be of some use by way of analogy but, of course, they were decided on a statute the language of which is different from the statute which we are now considering. In the case of *Rose v. Spicer* (1). Lord Cozens-Hardy M.R. laid down certain general principles, one of which was this: "If the breach is of a negative covenant such as not "to carry on a particular business on the demised premises, "the applicant must undertake to observe the covenant in "future, or at least must not avow his intention to repeat the "breach complained of." When the case came to the House of Lords (2) under the name of *Hyman v. Rose*, Lord Loreburn said this: "I desire in the first instance to point out that the "discretion given by the section is very wide. The court is to "consider all the circumstances and the conduct of the parties. "Now it seems to me that when the Act is so express to provide "a wide discretion, meaning, no doubt, to prevent one man "from forfeiting what in fair dealing belongs to someone "else, by taking advantage of a breach from which he is not "commensurately and irreparably damaged, it is not advisable "to lay down any rigid rules for guiding that discretion. I do

(1) [1911] 2 K. B. 234, 241. (2) [1912] A. C. 623, 631.

"not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted." I think that those words may well be applied to any attempt to fetter the wide discretion given to county court judges by the section to which I have referred. I think that this appeal must be dismissed.

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SOMERVELL L.J. I agree with the judgment which has been delivered. In the course of considering this case, I have been much indebted to the arguments on both sides. I was, at one time, inclined to take the view, on the note made by the learned county court judge, that he had thought he ought to exclude from his consideration the evidence as to the intention of the defendant to continue keeping a dog and, therefore, to continue breaking the covenant. If the learned county court judge had done this he would, to my mind, have been excluding evidence which is plainly material to the issue whether it was or was not reasonable to make the order. However, after listening to the arguments, I am satisfied that the words do not bear this meaning. I will not repeat what my brother Morton has said on this point but I am fully satisfied that the conclusion to which he has come is right, namely that the learned county court judge was taking into account everything that had happened up to the date of the proceedings, including the quite plain intention of the defendant to continue keeping a dog on the grounds of health which were put forward. In my view, therefore, that point which Mr. Edwards took fails, because the learned county court judge did not exclude that from his consideration.

There remains the other point, which I think can be formulated in this way. Mr. Edwards submitted that it can never be reasonable not to make an order if a breach is being deliberately continued by the defendant. That, as a proposition, seems to me to be too wide. Without giving examples, let me put it in this way. If there was evidence in a case that a breach was doing no harm of any kind to the landlord or to his interests, and if there was also evidence that the breach and its continuance was avoiding substantial hardship to the tenant,

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I am not prepared to say that in those circumstances there would be no discretion. I think, in those circumstances, under the words of this Act (which I will not repeat) the judge is entitled to weigh one matter against another and to come to a conclusion, having regard to the considerations and on the lines which were laid down and stated by the Master of the Rolls in the case to which reference has been made. Therefore this case, as it seems to me, was a case in which the learned county court judge could exercise his discretion after duly considering all relevant facts. I am satisfied that he did consider all relevant facts and, therefore, there is no ground on which this court should interfere with his discretion. For these reasons I agree that the appeal should be dismissed.

ASQUITH L.J. I also agree. At one stage, like my brother Somervell, I thought the learned county court judge had exercised his discretion on a wrong principle. If he had ruled out the tenant's declared intention to continue in breach of the covenant as a factor irrelevant to the exercise of that discretion, this would, I think, have involved the application of a wrong principle. Read literally, one sentence in his very short judgment suggested that this was what he had done, namely, the sentence in which he said that "it would not be reasonable" to make an order for possession in respect of breach of "covenant up to this date." The defendant's threat of continued breach had obviously been present to his mind right up to the moment when he spoke these words. What I think he meant was that he was taking into account all that had happened up to the date of his judgment, including not only actual breaches but threats of future breaches uttered up to that time, as contrasted with breaches which had not yet materialized but which might materialize in future. In these circumstances I do not think, on reflection, that he exercised his discretion on a wrong principle, and I do not feel it would be right to rule, as we have been invited to rule, that it can never be reasonable to refuse an order for possession against a tenant who threatens to continue in breach of a covenant. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs : *Blundell, Baker & Co.*
Solicitors for defendant : *Tarlo, Lyons & Co.*

J. W. H.

HENDERSON v. ROCK ASPHALT COMPANY LIMITED.

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Oct. 24.

Emergency legislation — Control of employment — Essential work — Scheduled undertaking—Specified person—Work done for longer than "normal working hours"—Dismissal without permission of national service officer—No serious misconduct—Wages claimed for subsequent period—Method of calculation—Essential Work (Building and Civil Engineering) Order, 1942 (St. R. & O. 1942, No. 2044), art. 4 (1.) (d)—Essential Work (Building and Civil Engineering) Order, 1944 (St. R. & O. 1944, No. 1435), art. 3.

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A specified person who was employed in an undertaking scheduled under the Essential Work (Building and Civil Engineering) Order, 1942, was dismissed without the permission of a national service officer being obtained as required by art. 4 (1.) (a) of the order except in the case of serious misconduct. Serious misconduct having been alleged, there was an appeal to the local appeal board and on January 13, 1945, the national service officer, after stating that the board was of opinion that the dismissal was not justified, gave notice that he was not going to direct the plaintiff's reinstatement but that the dismissal would be treated as ineffective up to the date of this notice. This was in accordance with art. 4 (9.) of the Order of 1942 as amended by an Order of 1944 and art. 4 (10.) then made art. 4 (1.) (d) applicable. The plaintiff claimed wages on the footing of a sixty-seven hour week and lodging allowance for the period that the dismissal was ineffective:—

Held, that on the construction of art. 4 (1.) (d) the plaintiff was entitled to recover during this period wages not only for the "normal working hours" (as there defined) of forty-four hours in each week but also for the twenty-three hours worked in each week in excess of the normal working hours; but that he was not entitled to recover anything in respect of lodging allowance and that a deduction must be made of any sum earned in other employment during this period.

APPEAL from West London county court.

The plaintiff, George Henderson, was employed by the defendants, Rock Asphalt Co., Ltd., from a date in 1944. The defendants were engaged on essential work and carried on a scheduled undertaking within art. 2 of the Essential Work (Building and Civil Engineering) Order, 1942, and on the plaintiff's coming to England from Scotland and reporting to the English secretary of the Asphalter's bureau, he was directed to the defendants who sent him first to Wales where he was employed for five weeks as a potman at 1s. 10½d. an hour and a lodging allowance. He was then sent to Berkshire for three weeks on the same terms and afterwards to Crimond, Aberdeenshire, where he worked on a mechanical mixer as a potman. He

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then was paid 1s. 11½*d.* an hour and worked sixty-seven hours a week. He also received a lodging allowance. On August 12, 1944, the plaintiff found himself without a lodging and he was then sent away without the consent of the national service officer having been obtained and his expenses were paid to Glasgow where the Scottish secretary of the industry was expected to supply further help to enable him to go to London. The case having been set up by the defendants that the plaintiff was dismissed for serious misconduct, there was an appeal to the local appeal board and on January 16, 1945, the national service officer wrote to the plaintiff as follows :

" I, the undersigned, have considered the recommendation
" of the local appeal board which on November 20, 1944, heard
" your appeal against dismissal on the ground of alleged serious
" misconduct. I have to inform you that I am not giving a
" direction for your reinstatement, but I hereby give you notice
" that the board, were of opinion that the dismissal was not
" justified on the ground of serious misconduct. I have further
" to state that under art. 4 (10.) (a) of the principal order
" the dismissal will be treated as having been ineffective up to
" the date of this ' notice ' and that on this date the employ-
" ment of the specified person shall be treated as properly
" terminated. In accordance with the provisions of the above
" mentioned order—(1.) a worker is entitled, subject to the
" usual conditions to a guaranteed wage for the period between
" dismissal and the date of this notice, (2.) a worker shall not
" be treated as not having been capable and available for work
" and willing to perform alternative services—(a) during the
" time spent in attending the appeal board hearing ; and
" (b) during the time spent in any alternative temporary employ-
" ment between dismissal and the date of this notice, though in
" this case there shall be deducted from any sums to which he
" is entitled in respect of any prescribed period falling within
" the date of dismissal and the date of this notice any sums
" earned by him in other employment during the prescribed
" period."

The defendants having been unable to agree with the plaintiff as to the amount payable to him in respect of the guaranteed wages, the plaintiff in July 1945, brought proceedings in the county court claiming 139*l.* 1s. 5*d.* for loss of wages suffered between August 14, 1944, and January 13, 1945, for wrongful dismissal, 37*l.* 14s. 3*d.* lodging allowance and 4*l.* 13s. 2*d.* travelling expenses. The defendants, while admitting the claim

for travelling expenses, alleged that the plaintiff was entitled only to 57*l.* 8*s.* 9*d.* for wages and no lodging allowance and that they had tendered to the plaintiff 64*l.* 13*s.* 3*d.* which they brought into court. By an amendment they further denied that he was entitled to anything.

The county court judge held that the plaintiff was entitled to recover wages in respect of sixty-seven hours a week during the period in question, less 22*l.* 9*s.* 8*d.* earned at other work by him during this time, and 37*l.* 14*s.* 3*d.* in respect of lodging allowance and the travelling expenses making in all the sum of 155*l.* 15*s.* 2*d.* The defendants appealed, claiming that the plaintiff could only recover wages on the footing of forty-four hours a week and no lodging allowance.

The material provisions of the Essential Work (Building and Civil Engineering) Order, 1942, as amended by the Essential Work (Building and Civil Engineering) Order, 1944, are contained in the judgment of Morton L.J.

Melford Stevenson K.C. and *Harold Paton* for the defendants. The effect of the Essential Work (Building and Civil Engineering) Order, 1942, as amended by the order of 1944 is by art. 4 (1.) (d), as made applicable by paras. 9 and 10, that the plaintiff is entitled to wages from August 14, 1944, to January 13, 1945, calculated on the normal working hours of forty-four hours for each week. It makes no difference that the man had been working sixty-seven hours a week. The contract with the workman is superseded by the Essential Work Orders : *George v. Mitchell and King* (1).

[MORTON L.J. Does not the provision towards the end of art. 4 (1.) (d) which provides that "all time worked in excess" of the normal working hours shall be treated as if it had been "paid for at the ordinary time rate," apply to entitle the plaintiff to be paid on the basis of the sixty-seven hour week.] Those words must refer to a period when the man is actually working when they refer to "all time worked," it must mean time actually worked. It is highly improbable that a man would be paid for overtime when he was not working.

Marcus Grantham for the plaintiff. The plaintiff is entitled to payment of wages on the footing of a sixty-seven hours week and to lodging allowance. That is his right apart from the Essential Work Order and art. 4 (1.) (d) only lays down a minimum payment to which the workman is entitled during a

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period when the dismissal has been ineffective. Should that contention be wrong as regards lodging allowance, he is clearly entitled to be paid in respect of a sixty-seven hours week. Although the "normal working hours" are laid down as meaning in relation to a week forty-four hours, it is later stated "in sub-para. (d) that "all time worked in excess of the normal "working hours shall be treated as if it had been paid for at the "ordinary time rate." That can only mean that the workman in a proper case is entitled to be paid not only for the normal working hours but also for any excess he has been in the habit of working.

Melford Stevenson K.C. replied.

MORTON L.J. This is, in my view, a very difficult case which turns upon the construction of words in certain orders which are not at all easy to construe. I do not feel any confidence that the construction which I place upon them is correct, but I do not think I should get any further light on the matter by reserving judgment.

The plaintiff in the county court claimed that the defendants owed him certain sums in respect of loss of wages, a sum by way of lodging allowance and a sum by way of travelling expenses. I need not trouble about the travelling expenses because the defendants have admitted that that sum is payable to the plaintiff. The two points in controversy are these: First, is the plaintiff entitled to wages on the basis of a sixty-seven-hour week (as the county court judge held) or is he entitled to wages on the basis of a forty-four hour week (as the defendants say); secondly, is he entitled to a sum by way of lodging allowance? The answers to the questions depend upon the construction of two orders: the first is the Essential Work (Building and Civil Engineering) Order, 1942, the second is the Essential Work (Building and Civil Engineering) Order, 1944. [His Lordship stated the facts, and continued:] I must now refer to the relevant provisions of the two orders which I have mentioned. I think the only article which I need read in the order of 1942 is art. 4: "(1.) Subject as hereinafter provided, "where a person carries on a scheduled undertaking the follow- "ing provisions shall apply:—(a) the person carrying on the "undertaking shall not terminate (except for serious mis- "conduct) the employment in the undertaking of any specified "person . . . except with the permission in writing of a "national service officer." In the present case the defendants

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believed (as it appears, mistakenly) that the plaintiff had been guilty of serious misconduct ; therefore they purported to terminate his employment without the permission of a national service officer. “ (b) a specified person shall not leave his employment in the undertaking except with such permission as aforesaid ; (c) not less than one week’s notice of the termination of the employment in the undertaking of a specified person shall be given by that person or by the person carrying on the undertaking, as the case may be, so, however, that this provision shall not apply where the specified person is dismissed for serious misconduct ; (d) without prejudice to any terms and conditions of employment more favourable to specified persons that may be provided for by the Conditions of Employment and National Arbitration Order, 1940, or by that order as amended by any subsequent order, the person carrying on the undertaking shall in respect of every prescribed period pay to every specified person a sum which is not less than the normal wage for the prescribed period if that person is during the normal working hours (i.) capable of and available for work ; and (ii.) willing to perform any services outside his usual occupation which in the circumstances he can reasonably be asked to perform during any period when work is not available for him in his usual occupation in the undertaking.” Then follows a definition paragraph, a portion of which I must read : “ for the purposes of this sub-paragraph, ‘ prescribed period ’ means, in relation to a person paid on a time rate basis ”—that applies to the plaintiff—“ a week ‘ normal working hours ’ means in relation to a week forty-four hours ”—I omit immaterial words—“ ‘ normal wage ’ means a wage calculated as follows, that is to say, either (i.) by reference to the time rate applicable to the person concerned and to the normal working hours on or during the prescribed period, as the case may be ” Then there follows an alternative method which does not apply to the present case because I apprehend that there is no difficulty in working out the time rate applicable to the plaintiff. Then come these words : “ All time worked in excess of the normal working hours shall be treated as if it had been paid for at the ordinary time rate.” Then there is a reference to Sundays, which I do not think applies to the present case.

The next paragraphs which are relevant are paras. 9 and 10 of art. 4 ; these have been amended by the order of 1944 so I

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must now turn to that order. Article 3 of that order, so far as material, is as follows: "In art. 4 of the principal order for " paras. 9 and 10 (which deal with the dismissal of specified " persons for serious misconduct) there shall be substituted the " following paragraphs." One has there a definite statement in the order that both para. 9 and para. 10 of the order of 1942—and therefore, I think, the paras. 9 and 10 which are substituted for them—relate to the dismissal of specified persons for serious misconduct. A suggestion was made that a distinction might be drawn between those two paragraphs, and that para. 9 was referring to serious misconduct while para. 10 was referring to something else. I do not think that that contention can be supported. I now read the substituted paras. 9 and 10: "(9.) The dismissal of a specified person for " serious misconduct shall, in the first instance, be provisional " only and if (a) within the period allowed by para. 1 of the " next succeeding article he requires a national service officer " to submit the matter to a local appeal board"—there is no doubt that the plaintiff did that in this case within the time laid down—" and (b) a national service officer under para. 3 of " that article directs the reinstatement of the specified person, " or, without so directing, gives a notice under that paragraph " to the person carrying on the scheduled undertaking and to " the specified person." I pause to say that that notice was given in the present case, and I understand that a similar notice was served on the defendants as the persons carrying on the scheduled occupation. The article proceeds: "the dismissal " shall, in the case of a direction, be treated as having been " ineffective, and in the case of a notice, be treated as having " been ineffective up to the date upon which the notice is given, " and on that date the employment of the specified person " shall be treated as being properly terminated." So that the position here is that up to the date of the notice in January, 1945, the purported dismissal is ineffective but at the date of the notice the employment of the plaintiff is treated as being properly terminated. The rest of para. 9 is immaterial. Paragraph 10, so far as material, is as follows: "Where the " dismissal of a specified person is treated as having been " ineffective (a) sub-para. (d) of para. 1 of this article shall have " effect in respect of any period elapsing after the dismissal " until the reinstatement takes place, or until the date upon " which the notice is given as aforesaid, as the case may " require; and (b) the specified person shall not for the purposes

“ of the said sub-paragraph be treated as not having been
 “ capable of and available for work and willing to perform any
 “ services which he could reasonably have been asked to
 “ perform by reason of his attendance at the hearing of his case
 “ by a local appeal board, or by reason of his having taken other
 “ employment, but in the latter case there shall be deducted
 “ from any sums to which he may be entitled under the said
 “ sub-para. (d) in respect of any prescribed period falling within
 “ that one of the periods mentioned in sub-para. (a) hereof
 “ which is relevant, any sums earned by him in that other
 “ employment during that prescribed period.” I should say
 at this point that in calculating the amount due to the plaintiff
 from the defendants the learned county court judge properly
 deducted the sum of 22*l.* 9*s.* 8*d.*, which had been earned by the
 plaintiff during the period in question. The terms of the orders
 which I have just read explain the terms of the letter of
 January 16, 1945. The result is that one is thrown back to
 art. 4 of the order of 1942.

It is said by Mr. Melford Stevenson, for the defendants, that
 that paragraph lays down the normal wage, to be calculated
 “ by reference to the time rate applicable to the person con-
 “ cerned and to the normal working hours on or during the
 “ prescribed period”; that “normal working hours” is
 defined as meaning, in relation to a week, forty-four hours.
 Therefore, he says, the plaintiff was entitled to be paid only on
 the basis of the time rate applicable to him for a working week
 of forty-four hours. I should have been inclined to agree with
 that submission but for the words which follow: “All time
 “ worked in excess of the normal working hours shall be treated
 “ as if it had been paid for at the ordinary time rate.” Mr. Mel-
 ford Stevenson seeks to explain those words by saying that they
 are referring to time actually worked, and that as the plaintiff
 did not work during the period in question these words have no
 application to him. I cannot accept that argument; I think
 that it is rendered impossible by the words “shall be treated
 “ as if it had been paid for at the ordinary time rate.” I think
 what is contemplated is this. This part of the article is looking
 back to the time when the man was actually working and
 contemplates a case in which the man was ordinarily working
 more than forty-four hours a week. The legislature has thought
 that in those circumstances it would not be fair that he should
 be paid during the period in question only the wages applicable
 to a forty-four hour week, and therefore has said, “All time

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“worked in excess of the normal working hours”—in the present case twenty-three hours, for the plaintiff worked sixty-seven hours a week—“shall be treated as it had been paid for at “the ordinary time rate.” I think the intention is that if a workman had, prior to the beginning of the period in question, worked more than forty-four hours a week, he should be paid during the period in question for more than forty-four hours a week, which strikes one as a very fair provision. At the same time it is said that he is not to be paid some exceptional rate but is to be paid for these extra hours at the ordinary time rate. I would add this (although it has only occurred to me during the course of delivering this judgment and, therefore, it may be a little rash) that the words, “Sundays and all time worked on “Sundays and all remuneration paid in respect thereof shall be “excluded” seem to me to fit into that construction of the article very happily, because again they contemplate the case of a man who, immediately prior to the period in question, had been working on Sundays. It provides, notwithstanding this, that during this period no payment for Sunday work is to be included.

As I have said, I think the construction of this order is very difficult, but it seems to me that the result of the construction which I have placed upon it is certainly not unfair. The workman will get the ordinary time rate and no more for the sixty-seven hours a week which he would have worked if the employers had not, mistakenly, thought that they had good cause to dismiss him without leave. He will not get his lodging allowance, which is really only applicable to the case of a man who is working and has to reside somewhere in the neighbourhood of his work. The employers, on the other hand, have to pay this quite substantial wage for a period when they were getting no work out of the man, because they made the mistake of thinking that the workman had been guilty of such conduct as entitled them to dismiss him without leave. The result is that this appeal in part succeeds, because I can find no provision in art. 4 for the payment of any lodging allowance. I think, therefore, that the judge was wrong in giving the plaintiff a sum by way of lodging allowance. On the other hand, for the reasons which I have stated, I think that the proper period for the calculation of the wages to be paid to the plaintiff is sixty-seven hours a week and not forty-four hours a week, and on this point the appeal fails.

SOMERVELL L.J. I agree with the judgment which has been delivered and that this case raises difficult points of construction.

I will not repeat the facts, which have already been fully stated, nor will I re-read the terms of the orders with which we are concerned.

Turning, first to paras. 9 and 10 of art. 4 of the order of 1942 as amended by the order of 1944, it is, I think, worth noting in para. 9 that dismissal for serious misconduct is, in the first instance, to be provisional, and in certain events (one of which happened in this case) it is to be treated as having been ineffective. I do not place any great reliance on this point, but it does not say that it is to be treated as wrongful. It is provisional, and if the specified person takes a certain action and is successful in getting a certain result it is to be treated as having been ineffective. Paragraph 10, as my Lord has already pointed out, applies sub-para. (d) of para. 1 of art. 4. If it had been intended that the person so dismissed or purported to be dismissed in the first instance should, during the period covered, get what he would have earned under his contract on the basis that the employer had continued to employ him and work had been available for him, it would have been very easy to say so. Quite plainly, the article applicable here does not say anything of this kind. I am also clear that the article is a complete code. It does not leave in the plaintiff any right to claim for wrongful dismissal or to claim damages outside the sums, whatever they may be, which the article gives him. It is, of course, possible that in the result the application of the article may diminish the sum which the employer would have had to pay if the man had worked for him during the period in question. It cannot, of course, be said that it diminishes what might have been his liability at common law if the Essential Work Order code had not intervened in the matter at all, because at common law I think under this contract he could have given an hour's notice. Under an ordinary contract he could have terminated the contract within a week and that would have set a limit to the damages. If the result is, as I shall shortly say I think it is, that the sum the workman is entitled to in the present case is, and in other cases may be, less than what he would have earned if he had worked and if work had been available for him, that result does not seem to me necessarily to be either surprising or unfair. The code, having fettered the employers' right (and, of course, it also fetters the workman's) may well provide for a sum which is no doubt designed to be, and I should think is, reasonable for such period, though less than the workman might in fact have been able to earn if he had worked.

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The question, I think, turns on the words which are to be found in art. 4 (1.) (d), under (i.) and (ii.), the words being "All time worked in excess of the normal working hours shall "be treated as if it had been paid for at the ordinary time rate." The question, as it seems to me, is : are those words to be applied to the period in respect of which you are seeking to calculate the minimum sum or are they to be construed as applying to the period which, no doubt, is to be looked at in order to decide what is a normal wage ? I think there is great difficulty in reading these words as applicable to the period in respect of which the minimum is being calculated. The words "shall "be treated as if it had been paid for" seem to me to contemplate time worked which has in fact been paid for. If in the period for which the minimum is being calculated time has been worked in excess of forty-four hours, I find great difficulty in seeing how any question as to what the minimum was would arise because from these very facts I should have thought the specified person would, through his labours, have earned more than the minimum which the paragraph, on this construction of the words in issue, guarantees. For these reasons, it seems to me that the words must be read as applying to the period before this part of the order comes to be applied and, in the case before us, read as applying to the period before the notice of dismissal was given. I think they mean at least this, that where you find the normal wage for the person or his grade is based on a week longer than forty-four hours you take that into account ; but these words provide that you disregard any extra rate, if there is such extra rate, for the excess hours. The provision would be quite unnecessary if it was not intended that you should take the extra hours into account. What the position would be if the regular working week was forty-four hours and the man at occasional intervals did overtime it is unnecessary to decide ; but in the present case, where there was a regular working day of twelve hours and that was the basis on which this man was employed, it seems to me the application of these words is reasonably plain. That entitles the plaintiff to get his remuneration on the basis of a sixty-seven hour week. I do not think he can claim the lodging allowance for the simple reason that this code does not seem to me to provide for lodging allowance. Whether that is for the reason which my brother has suggested or whether it was an oversight is, on the view I take, immaterial. It is sufficient to say that the order makes no provision for it. For these reasons, I agree

with the conclusion which has already been expressed by Morton L.J.

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ASQUITH L.J. I entirely agree.

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Order varied.

Solicitors: L. O. Glenister & Sons; A. L. Philips & Co.

H. C. G.

Followed. ROYAL CROWN DERBY
PORCELAIN CO., LTD. v. RUSSELL.
[1949] 1 All E.R. 749.

Followed. ROYAL,
ETC. PORCELAIN CO. v.
RUSSELL.
[1949] 2 K. B. 417

BRAITHWAITE & COMPANY LIMITED v. ELLIOT.

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Oct. 17, 18.

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Somervell and
Asquith L.JJ.

Landlord and tenant—Rent restriction—Claim for possession—Absence of alternative accommodation—Tenancy “in consequence of” tenant’s employment—Tenant’s knowledge of reason for tenancy—Relevance—Termination of employment—No resulting change in tenancy—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32), s. 3, sub-s. 1, Sched. I., para. (g).

A dwelling-house is let to a tenant “in consequence of” his employment within the meaning of para. (g) (i) (1) of Sched. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, so as to entitle the court, if it thinks reasonable, to make an order for possession under that paragraph without proof of suitable alternative accommodation, when the landlord’s reason

(1) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, sub-s. 1: “No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either—(a) the court has power so to do under the provisions set out in the First Schedule to this Act”

By the First Schedule to the Act: “A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house

“to which the principal Acts apply
“or for the ejectment of a tenant
“therefrom without proof of
“suitable alternative accom-
“modation (where the court
“considers it reasonable so to do)
“if (g) the dwelling-house
“is reasonably required by the
“landlord for occupation as a resi-
“dence for some person engaged in
“his whole-time employment or in
“the whole-time employment of
“some tenant from him
“and (i.) the tenant was
“in the employment of the land-
“lord or a former landlord, and
“the dwelling-house was let to
“him in consequence of that
“employment and he has ceased
“to be in that employment”

[Reported by R. C. CALBURN, Esq., Barrister-at-law.]

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for granting the tenancy was that the tenant was his employee; and whether or not the tenant was aware of the landlord's motive, is for this purpose irrelevant.

It is not sufficient to bring into existence a new tenancy, not consequent on the employment, that, the landlord having terminated the tenant's employment but not the tenancy, the tenant thereafter pays his rent to a collector instead of by deduction from his wages as previously.

Benninga (Mitcham), Ltd. v. Bijstra [1946] K. B. 58 applied.

Frederick Braby & Co., Ltd. v. Bedwell [1926] 1 K. B. 456 overruled.

Dictum of Lush J. in *Queen's Club Garden Estates, Ltd. v. Bignell* [1924] 1 K. B. 117, at p. 132 disapproved.

Murton v. Aldis (1929) 141 L. T. 168 distinguished.

Decision of county court judge reversed.

APPEAL from Kendal county court.

The plaintiffs, Braithwaite & Co., Ltd., were the owners of cottages at Mealbank, near Kendal, which they had built for the employees at their wool mill. In April, 1937, the defendant, George Richard Elliot, entered the employment of the company, and in November, 1937, he became tenant of one of the cottages at 4s. 11d. a week, the tenancy being oral. The rent was deducted by the landlords from the tenant's wages. The cottages, including that in question, had always been let by the landlords to their employees, although they had frequently allowed the dependants of an ex-employee to remain in occupation. In June, 1938, the landlords gave the tenant notice to quit his employment but not the cottage, the rent thereafter being collected from him weekly, as he was no longer in receipt of wages from the landlords from which they could deduct it. While the tenant was away on war service, his wife remained in occupation of the cottage. After his return, the landlords, in November, 1944, engaged one Shaw to work at their mill at Mealbank. Requiring the cottage for the occupation of Shaw, they gave the tenant notice to quit on December 12, 1945. The tenant having refused to leave, the landlords brought an action for possession.

The county court judge, while of opinion that it was *prima facie* reasonable to make an order for possession, and that the house was reasonably required by the landlords for someone in their whole-time employment, held (1.) that the letting was not "in consequence of" the tenant's employment within the meaning of para. (g) (i.) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933,

because, he found, the tenant did not know that the landlords were only letting it to him because he was their employee; (2.) that in any event a new tenancy was created after the cessation of the employment. He accordingly refused to make an order for possession.

The landlords now appealed.

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Douglas Lowe for the landlords. There is no justification for the county court judge's finding that a new tenancy came into existence on the termination of the tenant's employment with the landlords. The tenant merely continued in possession temporarily at the same rent as before. That does not constitute a new tenancy even though the rent was thereafter paid in the ordinary way to a collector instead of being deducted from the tenant's wages as previously. [*Murton v. Aldis* (1) referred to.] The judge was wrong in holding that the house was not let to the tenant "in consequence of" his employment within the meaning of para. (g) (i.) of sch. I. to the Act of 1933 because the tenant was not aware that that was the landlord's reason for letting it to him. The judge founded that view on *Frederick Braby & Co., Ltd. v. Bedwell* (2) and a dictum of Lush J. in *Queen's Club Garden Estates, Ltd. v. Bignell* (3) both of which, it is submitted, were wrong. This case is almost identical with *Benninga (Mitcham), Ltd. v. Bijstra* (4), and the judge's decision is inconsistent with it.

Comyn (Ormrod with him) for the tenant. It is submitted, first, that, when the tenant, after the termination of his employment, began paying the weekly rent in the usual way instead of by deduction from wages as previously, the old tenancy came to an end and a new one came into existence which obviously could not have been granted in consequence of the employment. Secondly, the original tenancy cannot be said to have been granted to the tenant in consequence of his employment, because he was unaware of any such reason in the landlord's mind. As to the first point, the court could hold in *Benninga (Mitcham), Ltd. v. Bijstra* (4) that no change of tenancy took place on the termination of the tenant's employment by the landlords, for the mode of paying the rent remained the same throughout. The change here in the method of paying rent from deduction to collection in the ordinary way necessarily points to an alteration in arrangements creating a new tenancy.

(1) [1929] 141 L. T. 168.

(2) [1926] 1 K. B. 456.

(3) [1924] 1 K. B. 117, 132.

(4) [1946] K. B. 58.

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In *Read v. Gordon* (1) it was held that a new tenancy had come into existence when the landlord's business, in which the tenant was employed, came to an end. There is no valid distinction between such a case and the termination of the employment by dismissal of the employee.

As to the second point, it is not enough to satisfy the wording of para. (g) (i.) of sch. 1 to the Act of 1933 that the landlord should in fact be the employer. So to hold would be to place the employer in a privileged position. It would also have the effect that premises would often be taken in the mistaken belief that the tenancy was protected by the Rent Restriction Acts. The letting has to be "in consequence of" the employment, and that cannot be the case if the tenant is unaware of any such cause for the granting of the tenancy.

If both these points are held invalid, it is still contended that a new state of affairs came into existence even without the intervention of a new contractual tenancy, and that accordingly at the relevant time, the tenant was not in any event a tenant to whom the premises had been let "in consequence of" his employment.

Lowe was not called on to reply.

MORTON L.J. [after stating the facts and reading the relevant provisions of the Act of 1933 continued:] As para.(g) has been the subject of a great deal of argument and of consideration by the courts I may be forgiven for referring to my recent judgment in *Benninga (Mitcham), Ltd. v. Bijstra* (2), with which Scott L.J. agreed. I then said (3)—and this passage in the judgment applies equally to the present case—"The county court judge . . . had to arrive at a conclusion on five questions: (i.) Is it reasonable to make an order for possession; (ii.) is this house reasonably required by the plaintiff company for occupation as a residence for some person engaged in its whole-time employment; (iii.) was the defendant in the employment of the plaintiff company; (iv.) was the house let to the defendant in consequence of that employment; (v.) has the defendant ceased to be in that employment? These questions arise under s. 3, sub-s. 1 (a) of the Act of 1933, and para. (g) of sch. I. to that Act. I have been careful to use in each case the same tense as that which appears in the statute because a great

(1) [1941] 1 K. B. 495.

(2) [1946] K. B. 58.

(3) [1946] K. B. 63.

"deal of the argument turned upon the date at which these questions must be considered. In my judgment, in answering the first two questions, the judge must have regard to the circumstances existing at the time when he hears the case, while for the purpose of answering questions (iii.) and (iv.) he must look back into the past."

Nothing arises in this case upon four of these questions because the judge has held, first, that it is reasonable to make an order for possession, assuming that the other requirements are satisfied, and, secondly, that the cottage in question is reasonably required by the landlords for occupation as a residence for some person engaged in their whole-time employment. There is no doubt that the tenant was—this refers to the past—in the employment of the landlords. Finally, there is no doubt that the tenant has ceased to be in that employment. The judge, however, has held in answer to the fourth question (and this was the basis of his judgment in favour of the tenant) that the house was not let to the tenant in consequence of his employment, within the meaning of the paragraph. The principal reason which led the judge to arrive at that conclusion appears in the following passage in his judgment: "When the cottage was let to the tenant in November, 1937, he was in the employment of the landlords and the landlords would not have let the cottage to the tenant had he not been in their employ, but I do not find that the tenant knew the fact or that he knew the cottage was let to him in consequence of his employment by them. There is nothing to show that the tenant knew that his tenancy was conditional on his remaining in the landlords' employment. On these facts it appears to me upon the authority of *Frederick Braby & Co., Ltd. v. Bedwell* (1), and *Queen's Club Garden Estates, Ltd. v. Bignell* (2), that the letting in November, 1937, was not in consequence of the tenant's employment."

In my view, at this stage the judge has misconstrued the paragraph, and I think it unlikely that he would have arrived at that conclusion if his attention had been directed to *Benninga (Mitcham), Ltd. v. Bijstra* (3). In my view, the material question is: what was the reason which actuated the landlord in letting the cottage to the tenant? The wording of the paragraph is: "and the dwelling-house was let to him in consequence of that employment." When there is an agree-

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(3) [1946] K. B. 58.

(2) [1924] 1 K. B. 117.

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ment of letting, the landlord agrees to let and the tenant agrees to take, and, in my view, under the paragraph one has to inquire only: what was in the mind of the person who let? Was the house let to the tenant in consequence of his employment or was it let to him for some other reason? That matter is, in my view, concluded against the tenant in the present case by *Benninga (Mitcham), Ltd. v. Bijstra* (1). If I may further quote from my judgment (2): "As to question (iv.)"—that is the question now under consideration—"it was stated by this court "in *Read v. Gordon* (3) that the crucial time at which this "question must be decided is the date of the notice to quit. "In my view the question which has to be decided, as at that "time, may be accurately stated as follows: Was the tenancy, "which was determined by the notice to quit, a tenancy which "had been granted to the tenant in consequence of his employ- "ment by the landlord?" It seems to me that the judge has answered that question in favour of the landlords: he has said, "the landlords would not have let the cottage to the "tenant had he not been in their employ." That, to my mind, is a finding of fact which concludes this point against the tenant. The judge then goes on to discuss other questions which are, in my view, irrelevant. He says: "I do not find that the tenant "knew the fact" above referred to—to my mind, whether he knew it or not is irrelevant—"or that he knew the cottage was "let to him in consequence of his employment by them"; that again, in my view, is irrelevant. He goes on to say: "There is nothing to show that the tenant knew that his "tenancy was conditional on his remaining in the landlords' "employment." I cannot find in the paragraph of the schedule the slightest trace of any of these matters being relevant to the consideration of the question before the court. *Frederick Braby & Co., Ltd. v. Bedwell* (4) and *Queen's Club Garden Estates, Ltd. v. Bignell* (5) were not cited to this court in *Benninga (Mitcham), Ltd. v. Bijstra* (1) but I feel bound to say that, in my view, *Frederick Braby & Co., Ltd. v. Bedwell* (4) was wrongly decided. In that case a Divisional Court had before them a finding of fact by the county court judge that the plaintiffs, who were the landlords, would not have let to the defendant but for his being employed by them. Notwithstanding that, the Divisional Court refused the landlord possession and

(1) [1946] K. B. 58.

(4) [1926] 1 K. B. 456.

(2) Ibid. 64.

(5) [1924] 1 K. B. 117.

(3) [1941] 1 K. B. 495, 505.

Shearman J., said (1) : " It is not disputed that the defendant " was in the plaintiffs' employment, but the question is whether " they let the house to him in consequence of that employ- " ment." Then he goes on to say : " The court must be satis- " fied not only that the landlords let the premises to the " defendant in consequence of his being in their employment, " but also that the defendant took the premises in consequence " of his being in their employment." I cannot agree with this statement. Further, in my view, it is irrelevant whether the tenant did or did not know that his tenancy was conditional on his remaining in the employment of the plaintiffs. Sankey J., said (2) : " I think the words do not have a uni- " lateral but a bilateral construction, and really mean that the " landlord lets and the tenant takes the premises in conse- " quence of the employment." He refers to, and relies upon, a dictum of Lush J. in *Queen's Club Garden Estates, Ltd. v. Bignell* (3). This court has recently approved the actual decision in the last-mentioned case, but I am unable to agree with the dictum referred to. Lush J. said (3), referring to similar words in a section in an earlier Act, " In my view " they mean, not that the landlord only knows, but that both " the landlord and the tenant know, that the premises were " let to the tenant in consequence of his employment."

On the view which I take of the construction of this paragraph, it is unnecessary for me to say whether I think that there was any evidence to support the judge's findings as to the tenant's state of mind ; but I feel grave doubt whether any such findings could be supported.

The second reason which the judge gave for his decision was this : He found that a new tenancy had been created and, therefore, that the tenancy which was in existence when the notice to quit was served was not a letting to the tenant in consequence of his employment. In my view, there is no evidence to support that finding. The tenant admittedly became a tenant of the landlords in November, 1937, at the rent mentioned. When his employment ceased no alteration was made in the terms of his tenancy. I cannot see anything which created a new tenancy. It is true that, as the rent could no longer be deducted from his wages, the tenant paid rent direct, but I cannot find that this fact caused any change in the legal relationship between these parties. It was, and it continued

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(1) [1926] 1 K. B. 458-9.

(3) [1924] 1 K. B. 117, 132.

(2) Ibid. 459.

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to be, that of landlord and tenant under the letting which began in November, 1937.

I think that every word of the following passage from my judgment in *Benninga (Mitcham), Ltd. v. Bijstra* (1) applies to the present case: "It is true that the plaintiff company continued to accept the rent"—in that case it was 10s. a week—"from the defendant after his employment had ceased, but I can see no good ground for holding that a new tenancy was thereby created. In my view the rent continued to be paid under the tenancy created in 1941"—in this case, 1937—"and there can be no doubt that that tenancy was granted to the defendant in consequence of his employment by the plaintiff company. Thus the tenancy which was determined by the notice to quit was a tenancy granted to the defendant in consequence of his employment by the plaintiff company" and question (iv.) must be answered in the affirmative."

The county court judge here relied on a number of cases as supporting his view that a new tenancy was created—namely, *Bond v. Pettle* (2), *Great Northern Ry. Co. (Ireland) v. Best* (3), and *Murton v. Aldis* (4). I think that I need only say that in each of them the facts were very dissimilar to the facts in the present case, and that in each of them the court held on the facts that there had been a termination of the old tenancy and the creation of a new one.

One naturally feels sympathy for a man who is losing his cottage, but in the present case there is bound to be hardship to one party or the other, and the county court judge, with all the facts before him, thought that it was reasonable to make an order for possession. This appeal must be allowed.

SOMERVELL L.J. I agree, and I do not desire to add anything to what has been said on the first point in the case, because everything that I had in my mind has been fully and clearly expressed by my brother Morton. As, however, we are differing from the county court judge, I wish to make some brief observations on the second point in the case, namely, whether there was a new tenancy. The county court judge referred to, and, indeed, regarded as indistinguishable in principle, *Murton v. Aldis* (4). In that case the defendant, at the time when the issue arose, had been in occupation of the house for a considerable period at a rent of 5s. a week, which had been fixed by the

(1) [1946] K. B. 64-5.

(3) (1921) 55 Ir. L. T. 57.

(2) *The Times*, Jan. 15, 1921.

(4) 141 L. T. 168.

county court judge. That rent had been fixed by the judge after the defendant had been in the house for some time as a person employed by the landlord, and after the employment had terminated. I think it important to note, having regard to the arguments addressed to us, and the line which the county court judge here took, that in the statement of facts in that case no details were given as to the rent paid by the tenant during the first period of the tenancy, or the first period of his occupation, while he was in the employment of the landlord. Therefore, on the evidence, it was plain that, after he ceased to be in the employment of the landlord, and there was this reference to the county court judge on the notice to quit, the judge being asked to fix a reasonable rent, a new rent came into existence. Not only does that distinguish this case from the present case, but, if one reads the judgment of Lord Hewart C.J., I think his whole reasoning is seen to be quite inconsistent with the argument which was addressed to us here, namely, that on the facts of this case a new tenancy could be found in law. If the principle suggested by counsel for the tenant were right, Lord Hewart C.J., would never have said that *Murton v. Aldis* (1) was a difficult case, because it would have been an a fortiori case on that principle.

I add those observations because I think that a study of the cases (I will not cite the others) to which the county court judge refers really supports the conclusion at which we have arrived in this case. I think that the appeal must be allowed.

ASQUITH L.J. I agree. On the issue whether there was a new tenancy, I have nothing to add to what has fallen from my brother Somervell; but, at the risk of repetition, I would like to add certain observations on the other issue, namely, whether the cottage was "let to" the tenant "in consequence of" his employment by the landlords. Who let this cottage? Obviously the landlords. Why did they let it to the tenant? Because he was employed by them. That is what the county court judge has found. That seems to me to conclude the matter. If para. (g) (i.) had read: "and a lease of the dwelling-house was accepted by the tenant in consequence of that employment," other considerations would arise. The criterion might then be solely the motive of the tenant. On the actual wording I think that the criterion was solely the motive of the lessors. Nor can I see any justification for what

(1) 141 L. T. 168.

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C. A. has been called a bilateral reading of the words, "in consequence of that employment," whether such a reading is held to imply a common motive on both sides, or only knowledge by the tenant of the motive of the lessor, or, again, something in the nature of a contractual consensus to a tenancy contingent on the continued employment of the tenant.

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So far as *Frederick Braby & Co., Ltd. v. Bedwell* (1) decided the contrary, I agree that it is wrongly decided. It seems to me, further, to be inconsistent with the decision of this court in *Benninga (Mitcham), Ltd. v. Bijstra* (2); but even if both these difficulties were out of the way, I should feel very doubtful whether the county court judge was justified in finding that the tenant did not in fact know that the landlords let to him in consequence of his employment. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for landlords: *Kingsford, Dorman & Co., for Milne, Moser & Son, Kendal.*

Solicitors for tenant: *Beachcroft & Co., for Ernest Temple, Kendal.*

(1) [1926] 1 K. B. 456. (2) [1946] K. B. 58.

Baker v. Lewis [1947] K. B. 186
Reasoning of Morton L.J. applied.
POWELL v. CLELAND
[1948] 1 K. B. 262

Applied. *McINTYRE v. HARDCASTLE.*
[1948] 2 K. B. 82

Distinguished. LITTLECHILD v. HOLT.
[1949] 1 All E.R. 933.

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[1950] 1 K. B. 1

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Landlord and tenant—Rent Restrictions Acts—Landlords holding jointly
—Meaning of "landlord"—Meaning of "purchasing"—Rent and
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Geo. 5, c. 32), s. 3, sch. I para. (h).

The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sch. I. (as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938) provides: "A court shall for the purpose of s. 3 of this Act have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply . . . without proof of suitable alternative accommodation (when the court considers it reasonable so to do) if—

"(h) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after the 6th December, 1937) for occupation as a residence for—(i.) himself; or (ii.) any son or daughter of his over eighteen years of age; or (iii.) his father or mother;

" Provided that an order or judgment shall not be made or given on any grant specified in para. (h) of the foregoing provisions of this Schedule if the court is satisfied that having regard to all the circumstances of the case . . . greater hardship would be caused by granting the order or judgment than by refusing to grant it."

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Held (1.) the word " landlord " in para. (h) includes in its meaning joint owners of a dwelling-house.

(2.) In the passage " a landlord by purchasing the dwelling-house " the word " purchasing " has the ordinary meaning of buying and not the technical meaning sometimes given to purchase as in the expression " by purchase."

(3.) In considering the question of " greater hardship " the court can take into account that the landlord desires to have living in his house persons who have been previously living with him outside his sons or daughters or parents.

APPEAL from West London county court.

The plaintiffs, Mrs. Baker and Mrs. Joubert were sisters to whom No. 7, Bowfell Road was bequeathed by will, but subject to the existing weekly tenancy of the defendant Joseph Lewis let to him at a rent of 25s. a month. Probate of the will had been granted to Mrs. Baker on August 12, 1942, as sole executrix. Notice terminating the tenancy was duly given, as the plaintiffs wished to reside in the house, and on the failure of the tenant to give up possession the plaintiffs brought proceedings to recover possession of the house. The hearing in the county court took place on May 15, 1946, but before then Mrs. Baker executed a vesting deed in favour of herself and her sister as joint tenants. On the facts the county judge was in favour of the plaintiffs on the question of " greater hardship " arising under s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and para. (h) of Schedule I., to that Act but he held that two persons together could not constitute the " landlord " within para. (h) and dismissed the action on that ground.

The plaintiffs appealed.

Grattan-Doyle for the plaintiffs. The county court judge having found the facts in favour of the plaintiffs the only questions that arise under para. (h) of the schedule to the 1933 Act are (1.) what the meaning of " purchasing " is in the passage " a landlord who has become landlord by the purchasing the " dwelling-house " it having been contended that " purchasing "

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must be given the same technical meaning as is given to the expression "by purchase"; (2.) what is the meaning of "landlord," and does it include "joint landlords." As regards the second of these points the plaintiffs are suing as owners and there is no ground for restricting the meaning of landlord to the singular: see Interpretation Act, 1889, s. 1. There is a passage in Morton L.J.'s judgment in *Sharpe v. Nicholls* (1) which may have wrongly led the county court judge to restrict the meaning of landlord. [Counsel was pursuing his argument on this point when Morton L.J. intimated that the court had decided on October 25, 1946, in the case of *Owen v. Overy* (2)—the point having been conceded by counsel—that joint tenants were a "landlord" within para. (h). As regards the first point a person who purchases a house is clearly a buyer and can have no technical meaning and the same is true of "purchasing" in the passage "landlord by purchasing" the dwelling-house.]

Manningham-Buller K.C. and *Roger Willis* for the defendant "Landlord" in para. (h) of sch. I. to the Act of 1933 should not have the extended meaning of two or more landlords in view of the reference to the landlord, his son or daughter or father or mother. It is not suggested that landlord has the restricted meaning of a single person except in para. (h). The paragraph is drafted to limit so far as possible the power to recover possession from the occupying tenant as shown by the exclusion of "a landlord by purchasing" the house after a certain date and only allowing a landlord to get it for occupation by himself or a child or parent. The work of the court in determining the question of "greater hardship," always difficult would be increased greatly if there were two or more landlords. Again in the passage "landlord by purchasing the" dwelling-house "purchasing must be given the same technical meaning as in the expression "by purchase" and that excludes the plaintiffs' claim. There is no authority to support this and in *Inland Revenue Commissioners v. Gribble* (3) "purchase" in another Act is given its natural meaning. Lastly, the county court judge in considering the question of "greater hardship" ought not to have taken into account the plaintiff Mrs. Joubert's desire to have living in the house persons outside her own family who had been living with her hitherto.

[He referred to *Sharpe v. Nicholls* (4).]

(1) [1945] K. B. 382, 389.

(3) [1913] 3 K. B. 212, 216.

(2) Unrep.

(4) [1945] K. B. 382.

MORTON L.J. (after stating the facts, continued) I must first refer to the sections of the 1933 Act. The relevant section is s. 3, sub-s. 1, of the Act. "No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order to give such a judgment, and " (I only quote the relevant part of the section) "the court has power so to do under the provisions set out in the First Schedule to this Act." The plaintiffs relied on para. (h) of that schedule, which I shall treat myself as having read in full, as it has been frequently read in this court. The learned county court judge thought that in that section the word "landlord" only referred to one person as plaintiff and had no application where two joint owners were claiming possession. For this reason, he refused the plaintiffs possession. In the present case no question arises in regard to the matter which was discussed by this court in *Sharpe v. Nicholls* (1), as to whether legal personal representatives, not being beneficially entitled, can obtain possession as "landlords," because in the present case the plaintiffs have the legal estate and they are also the sole beneficial owners. As regards the question whether two persons together can constitute the "landlord" within para. (h), the matter is not free from authority, although it is not dealt with so far as I know in any reported case. In this court on Friday, October 25, there was decided a case of *Owen v. Overy* (2). In that case the parties seeking possession were husband and wife and they had acquired the property in the following manner. The previous owner was a son of theirs who died on July 25, 1937, intestate and a widower, and without issue. Letters of administration of his estate had been granted to the plaintiffs and the plaintiffs had executed a vesting deed vesting the property in themselves. In the course of my judgment I said this: "The result of that was that the plaintiffs were not only administrators: they, and they alone, as parents of the intestate, were beneficially entitled to the proceeds of sale under the statutory trust for sale which arose on the death of the intestate. They have not only the legal estate, but the whole beneficial interest in the property. For that reason, in my view, they would be 'landlords' within para. (h) of the schedule. Further, it is admitted by the defendants, very frankly, that there is a vesting

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(1) [1945] K. B. 382.

(2) Unrep.

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"assent, vesting the property in the plaintiffs, which could
 "have been produced at the hearing in the county court."
 My brethren agreed with these views.

It seems to me that that is a decision of this court that two persons can together constitute a "landlord" within the meaning of para. (h). The point was not argued in that case, because on production of the documents to which I have referred counsel for the defendants conceded that he could not contend that the plaintiffs were not "landlords." But I would add this: on further considering the matter I feel no doubt that two persons can be the "landlord" within para. (h). One starts with the Interpretation Act, 1889, which enacts, by s. 1, "In this Act and in every Act passed after the year 1850, whether before or after the commencement of this Act, unless the contrary intention appears— . . . words in the singular shall include the plural." It seems to me that when two people jointly entitled legally and beneficially are seeking possession of premises there is no reason why they should be excluded from coming within the meaning of the word "landlord" in para. (h). They may be seeking possession of the premises for occupation as a residence for themselves, and I do not think that in the paragraph which we are now considering a "contrary intention appears." However, I think that this point is really concluded against the present defendant by the decision of this court in *Owen v. Overy* (1).

That being so, these two persons, who are the "landlord" within para. (h), require this property as a residence for themselves. Mr. Manningham-Buller relied on the fact that the plaintiffs proposed to bring with them to occupy this house other persons who did not come within the precise words of para. (h), and he suggested that these persons could not be taken into consideration when the learned judge was arriving at his conclusion. It is true that the plaintiffs could not, for example, come within para. (h) if they "required" the dwelling-house for occupation as a residence for, for instance, a nephew or niece, but I think that, if they require the house as a residence for themselves, in deciding the other points which arise in the case the learned judge ought to take into consideration the fact (if it be a fact) that there are other persons residing with them in their present premises whom they do not wish to turn into the street.

The second point which was put forward by Mr. Manningham-Buller was that the words in para. (h) "not being a landlord

(1) Unrép.

" who has become landlord by purchasing the dwelling-house " or any interest therein after the 6th December, 1937," excluded the plaintiffs in the present case because they became landlords " by purchasing " on the death of the previous owner within the meaning of these words. He said that the word " purchasing " should be given a technical meaning. Now I am well aware that the word " purchaser " and the words " by purchase " have in certain contexts a technical meaning which is well-known to all lawyers, but I am not aware of any case in which the words " by purchasing the dwelling-house " have been given any technical meaning. For my part I feel no doubt that they simply refer to a transaction of purchase or buying. If I had felt any doubt on that point I should have been assisted by the decision in *Commissioners of Inland Revenue v. Gribble* (1), to which Mr. Manningham-Buller very rightly called our attention.

Thirdly, Mr. Manningham-Buller submitted that there was no evidence upon which the learned judge could find that greater hardship would be caused by refusing the order than by granting it, and suggested that there was nothing to show that Mrs. Joubert was in any position of hardship. I cannot accede to that argument. I think there was evidence on which the learned judge could so find, balancing the position of the joint plaintiffs against the position of the defendant. One point remains. The learned judge does not expressly refer to the two other questions which he had to decide: that is to say, whether it was reasonable to make the order within s. 3, sub-s. 1, and whether the premises were reasonably required by the plaintiffs within para. (h). But as he gave a decision on the question of greater hardship, and as he could never have reached that point without coming to a conclusion upon the two questions which I have mentioned, I think it is only right to assume that he did think that it would be reasonable to make an order (if he was wrong on his construction of the statute) and that he did think the house was " reasonably required " within para. (h). On the other hand, I think there is much force in Mr. Manningham-Buller's contention that if the learned judge had thought the case came within para. (h) he would probably have given the defendant some latitude as to the date on which possession was to be given up. I think that submission is well founded. Some months have elapsed since the decision was given, and it may be if we send the matter back to the county court judge he

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will not give any further time. I express no view on that. I think that, unless the parties can agree upon a date on which possession is to be given, the matter must go back to the county court judge to consider, in the light of our judgment, what extension of time, if any, should be given to the defendant for delivery up of possession.

There is one more matter to which I should refer. Counsel for the plaintiffs rightly called attention to a passage in my judgment in the case of *Sharpe v. Nicholls* (1), and he suggested that that passage may have influenced the county court judge in arriving at his conclusion that only one person could be the "landlord" within para. (h). In that passage I said: "In those circumstances, one must consider whether it can be said that the 'dwelling-house is reasonably required by the 'landlord for occupation as a residence for himself or herself' when the plaintiffs are legal personal representatives suing in that capacity and one of them wants to live in the house. In my opinion, such a case is not within the terms of para. (h) of sch. I. at all. Strange results would follow if that were not so. For instance, you might have four legal personal representatives, none of whom was related to the testator at all, and one of them might require the house as a residence for himself or herself, having no beneficial interest whatsoever in the property. I am clearly of opinion that such a case could not possibly be within the terms of para. (h). It is also to be observed that the words 'himself or any son or daughter of his . . . or his father or mother' seem to refer to a person who is the landlord not in the sense that he or she is one of several personal representatives but in the sense that he or she is the sole owner of the property subject to the tenancy." Taken apart from its context, that passage might seem to indicate that I had thought only one individual could be a "landlord" within para. (h), but I desire to say that, as appears from the context, my attention was concentrated on the contrast between those who could only come forward as personal representatives and those who could come forward as persons having the beneficial interest in the property, and I did not intend to suggest that two persons could not possibly be a "landlord" within the meaning of para. (h) if those two persons were the sole beneficial owners of the property.

For these reasons I think that, unless the parties agree on a date, the matter must go back to the county court judge for a decision on the one point to which I have referred.

(1) [1945] K. B. 382, 389.

SOMERVELL L.J. I agree with the judgment which has been delivered and with the reasons which have been given for it. I only wish to add a few words on one point. In the present case, as in the case which this court decided quite recently, *Owen v. Overy* (1), the position was simple, in this respect, that the joint owners were both suing for possession for themselves and were intending both to occupy themselves. In that case it was husband and wife; in the present case it is two sisters. All I want to say is that I am not in any way implying or suggesting that this para. (h) is only applicable in the case of joint owners where they are desiring the dwelling-house for occupation as a residence for them all. I myself am inclined to take the view that it has a wider application and that it would cover the case where A, B and C, being joint owners, put forward a claim for possession, in the circumstances in which it would arise, alleging that the residence is required for occupation as a residence by A. I only mention that in case any misunderstanding should arise if anybody suggested that our decision impliedly limits the section to cases like the present where both joint owners are wishing to occupy. The other case is of course open to argument in the future

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Dicta of ASQUITH, L.J., applied.
MCINTYRE v. HARDCASTLE. [1948]
 1 All E.R. 696.

ASQUITH L.J. I agree with the judgments that have been delivered, subject to one doubt which I feel in relation to the point last raised by Somervell L.J. This court has decided, in *Owen v. Overy* (1) that "landlord" in para. (h) of the first schedule to the Act of 1933 covers two or more joint beneficial owners, and in *Sharpe v. Nicholls* (2) that it does not cover two or more bare personal representatives. Where there are two or more joint beneficial owners, I would incline to a construction of (h) narrower than put forward or kept open, by my brother. In the event (i.), (ii) and (iii.) of (h) should, I think, be read as follows: in (i.), for "himself" read "themselves"; in (ii.), for "any son or daughter of his" read "any son or daughter of theirs," and in (iii.), read "their father or mother." Where, read in this way, neither (i.), (ii.) nor (iii.) has any application, such beneficial owners would fail—for instance, if they proceed under (ii.) and are not a married couple with a child, or if they proceed under (iii.) and have not got a parent in common; but they would fail in that case not because there are several of them or because they are not a "landlord" within the opening words of the section, but because they could

(1) Unrep.

(2) [1945] K. B. 382.

C. A. not bring themselves within the language of (i.), (ii.) or (iii.),
1946 construed in the way I suggest. I agree with the proposed
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Appeal allowed.

Solicitors: *Willis & Willis for Freeborough & Co., West
Kensington, Gibson & Weldon for Pinhorn & Co., Walham
Green and Chelsea.*

H. C. G.

Applied. LINES v. HERSOM. [1951]
2 All E.R. 650.

Applied REAY v. YOUNG. [1949]
1 All E.R. 1102.

WHITTALL v. KIRBY.

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Nov. 6, 9.

Lord Goddard
C.J.,
Lewis and
Oliver JJ.

*Motor car—Conviction for driving motor car on road when under the
influence of drink—Disqualification for holding licence—Special
reasons for court not imposing disqualification—What amounts to
special reasons—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43),
s. 15, sub-s. 2.*

By s. 15, sub-s. 2 of the Road Traffic Act, 1930, a person convicted under that section of driving a motor car on a road when under the influence of drink or drugs "shall, unless the court for "special reasons thinks fit to order otherwise and without prejudice "to the power of the court to order a longer period of disqualification, be disqualified for a period of twelve months from the "date of the conviction for holding or obtaining a licence":—

Held, that a "special reason" within the section is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is in other words a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, but directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence, is not a "special reason" within the section. No consideration of financial hardship, or of the offender being before the court for the first time, or that he has driven for a number of years without complaint can be regarded as a special reason within the section.

CASE STATED by justices.

At a court of summary jurisdiction sitting at Birmingham, charges were preferred by the appellant, Harold Whittall, an inspector of police, against the respondent, Henry Kirby, for having on June 5, 1946, contrary to s. 15 of the Road Traffic Act, 1930, driven a motor car, to wit a motor lorry, on a road while under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, and for having,

contrary to s. 11 of the Act, driven the said motor vehicle recklessly and in a manner which was dangerous to the public. The charges were heard before the justices on June 6, 1946, when the appellant was represented by a solicitor. The respondent was unrepresented. The respondent pleaded guilty to the charges. The justices accordingly convicted him on the first charge and imposed a penalty of 20*l.* and 23*s.* special costs and ordered his driving licence to be endorsed with particulars of the conviction. In consideration of the facts the justices thought fit to order that he should not be disqualified for holding or obtaining a licence. In assessing the penalty the justices took into consideration the fact that they did not intend to impose a penalty of disqualification otherwise they would not have imposed such a heavy monetary penalty. They dismissed the second charge under the Probation of Offenders Act.

At the request of the appellant the justices agreed to state the following case.

Upon the hearing of the said charges (a) evidence of character was given by the appellant who stated that the respondent was not in any regular employment but acted as an occasional dealer for which purpose he drove a lorry. (b) A police officer commenced to read a list of previous convictions beginning with a conviction on October 6, 1941, for being drunk and disorderly and a similar conviction on September 27, 1939, when the justices intimated that he need not proceed further as they did not relate to motoring offences.

On the part of the appellant it was contended that there was no evidence before the justices of any facts which would constitute special reasons within the meaning of s. 15, sub-s. 2, of the statute. The attention of the justices was directed to *Rex v. Recorder of Leicester, Ex parte John Gabbitts* (1).

The justices stated in the case that having no knowledge of any previous motoring convictions against the respondent, and having regard to the fact that the retention of his licence was essential for obtaining his livelihood, and further that they had imposed a substantial penalty for his offence, they came to the conclusion that these circumstances constituted special reasons within the meaning of the said section, and they determined that he should not be disqualified for holding a licence as aforesaid.

The question for the opinion of the court was whether the

(1) [1946] 1 All E. R. 615.

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justices had come to a correct determination and decision in point of law.

Gerald Gardiner for the appellant. This case raises for the first time in this country what constitutes "special reasons," entitling a court to order that a person convicted under s. 15 of the Road Traffic Act, 1930, for driving a motor vehicle on a road when under the influence of drink or drugs should not be disqualified for holding a licence. The Road Traffic Act, 1930, contains several provisions requiring that a person convicted of certain offences shall be disqualified for holding or obtaining a licence "unless the court for special reasons thinks fit to "order otherwise": see s. 11, sub-s. 3. The Road Traffic Act, 1934, provides in s. 5, sub-s. 1, that where a person is convicted of driving a motor vehicle on a road at a speed exceeding the speed limit or for careless driving the court shall "unless for "any special reason the court thinks fit to order otherwise, "order particulars of the conviction to be endorsed on any licence "to drive a motor vehicle . . . held by the person "convicted." The question what constitutes special reasons came up for decision in Northern Ireland in *R. v. Crossan* (1) where the defendant was charged with using a motor cycle on a highway without there being in force a policy of insurance against third party risks contrary to s. 2, sub-s. 2, of the Road Traffic Act (Northern Ireland), 1930. The King's Bench Division of Northern Ireland held that a special reason within the exception prescribed by s. 6, sub-s. 2, was one which is special to the facts of the particular case, that is special to the facts which constitute the offence; and that a circumstance peculiar to the offender as distinguished from the offence was not a special reason. The same point came before the High Court of Justiciary in Scotland in *Muir v. Sutherland* (2) where the offence charged was exceeding the speed limit and the court held that the words "special reasons" could not be construed to cover the absence of a prior endorsement. In *Adair v. Munn*; *Adair v. Brash* (3) the court held, with two dissentients, that considerations of hardship and similar mitigating circumstances personal to the convicted person were not "special reasons." In *Murray v. Macmillan* (4) which was a case under s. 35 of the Road Traffic Act, 1930, of driving a motor car without a policy of insurance against third party risks being

(1) [1939] N. I. 106.

(2) 1940 S. L. T. 403.

(3) 1940 S. L. T. 414.

(4) 1942 S. L. T. 55.

in force it was held by the Court of Justiciary that although the language of s. 15, sub-s. 2, of the Act of 1930 was identical with that of s. 35, sub-s. 2, it did not necessarily follow that considerations relevant to constitute special reasons within the meaning of s. 15, sub-s. 2, would constitute special reasons within the meaning of s. 35, sub-s. 2, and that prejudice to the public interest likely to result from an offender's disqualification was a special reason which would entitle a court to reduce or remit the disqualification under s. 35. In *Fairlie v. Hill* (1) which was also a case under s. 35, the Court of Justiciary sent the case back as there were other facts not set out in the case which the court thought might constitute special reason within the section. This court will follow those decisions that were given under s. 15. The facts stated do not amount to special reasons. No circumstance can constitute special reason unless it relates to the offence. The fact that this offence was a first offence cannot amount to a special reason. This court has held that justices cannot dismiss a case under the Probation of Offenders Act on the ground that it was a trivial offence. That Act does not apply to the present case.

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The respondent did not appear and he was not represented.

LORD GODDARD C.J. The appeal will be allowed and the case remitted to the justices with an intimation that the facts found by them do not and cannot amount to special reasons within s. 15 of the Road Traffic Act, and with a direction that the court is to suspend the licence for a period of not less than twelve months from the date the order is made in conformity with the directions of this court. The court will give the reasons for their decision later.

Nov. 12. LORD GODDARD C.J. read the following judgment. The court has already allowed this appeal and now proceed to give their reasons.

The respondent in this case was charged before a court of summary jurisdiction for the City of Birmingham on two charges, first with driving a motor vehicle, to wit a lorry, while under the influence of drink to such an extent as to be incapable of having proper control of the vehicle contrary to s. 15 of the Road Traffic Act, 1930, and secondly, driving a motor vehicle recklessly and in a manner which was dangerous to the public, contrary to s. 11 of the Act. He pleaded guilty to both charges.

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On the first charge the justices imposed a fine of 20*l.* and ordered his driving licence to be endorsed, but in consideration of certain facts which they state in the case they refrained from ordering that he should be disqualified from holding a driving licence, and the question raised by the case is whether on the facts found by them there were any special reasons within the meaning of s. 15, sub-s. 2, of the Act which would justify the justices from refraining from imposing a period of disqualification. The second charge they dismissed under the Probation of Offenders Act, and although the case is not stated with regard to the second charge, as it is referred to I shall have a word to say about it in my judgment.

This is the first occasion on which the question what can amount to special reasons justifying a court refraining from suspending or, in one case from endorsing, a licence has arisen in this country. It raises a question of the utmost importance at the present day, for it is well known that great diversity of opinion and practice prevails in different courts throughout the country. In some courts disqualification is imposed almost as of course; in others, various reasons are accepted as constituting special reasons, such as that the defendant earns his living by driving cars, or is a first offender, and these are considered sufficient to justify magistrates from taking a course which Parliament has laid down is to be followed, at any rate *prima facie*, in the event of a conviction.

The matter has been the subject of judicial decisions both in Northern Ireland and in Scotland, and in so far as the provisions of s. 11 and s. 15 of the Act are concerned, the decisions in both countries have been uniform. There is one other section which we shall have to consider, namely, s. 35 of the Act of 1930, on which in Scotland at least there seems to have been some difference of opinion among the judges. The opportunity of considering in this court the true effect of the meaning of these sections has now arisen partly no doubt because early this year in the case of *R. v. Recorder of Leicester, Ex parte Gabbitts* (1), this court said that when any court refrained from imposing a disqualification on a conviction which carried this penalty, it was their duty to state the facts which they found constituted special reasons entitling them to refrain from imposing disqualification.

The sections of the Road Traffic Act which oblige a court to impose disqualification on conviction are, in the Road Traffic

(1) [1946] 1 All E. R. 615.

Act, 1930, s. 11 which provides for disqualification on a second or subsequent conviction for reckless or dangerous driving ; s. 15, which deals with driving when under the influence of drink or drugs, and s. 35 which deals with using or causing or permitting a vehicle to be on the road unless a policy of insurance is in force in respect of third party risks in respect of the person (speaking compendiously) who uses it or the owner who permits its use. In the Road Traffic Act, 1934, s. 5, there is a provision requiring the endorsement of a licence where a person is convicted for exceeding the speed limit. In cases coming within ss. 11 and 15, the Act of 1930 provides that the offender shall be disqualified from driving for at least a certain period ; in the case of s. 11 he may be disqualified for such period as the court thinks fit, and in both cases he is to be disqualified unless for special reasons the court shall think fit to order otherwise. For an offence under s. 11, sub-s. 1, the court may exercise their power of disqualification on a first conviction, but this is left to their entire discretion. Under s. 5 of the Act of 1934, the court is required to endorse particulars of the conviction on the licence, but again it is provided that for special reasons the court may refrain from taking this step.

The reasons given in the present case by the justices as the ground on which they refrained from ordering disqualification are :—(1.) That they had no knowledge of any previous motoring convictions against the respondent ; (2.) that the retention of the licence was essential for obtaining his livelihood, and further that they had imposed a substantial penalty for the offence and in assessing that penalty they took into account that they did not intend to disqualify him. It is quite clear that the two main reasons which influenced the bench were that the respondent was a first offender against the Road Traffic Acts and that he earned his living as a lorry driver, and that his employment would be jeopardized by the suspension of his licence. The court cannot but observe with some surprise that considering the man was charged with driving under the influence of drink, the court stopped a police officer from informing them of the convictions recorded against the defendant for being drunk and disorderly. I should have thought that any court would have considered the question whether a man had been convicted of drunkenness on one or more occasions a most material factor in considering whether special reasons existed for refraining from disqualifying him as a motor driver ; but in my opinion none of the facts found by the

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justices can amount to a special reason within the meaning of the section.

It is to be observed that the sections are mandatory and that Parliament has provided that a period of disqualification shall be imposed or, in the case of exceeding the speed limit, that the licence shall be endorsed, but they have given a discretion to the court which obviously is a limited discretion to be exercised only for special reasons. The limited discretion must be exercised judicially. The reasons inducing the court to exercise it must be special, and special is the antithesis of general. The fact that a man is a first offender or that he has committed no motoring offence for many years are reasons of the most general character that can well be imagined. Every year hundreds of first offenders are brought before courts. It frequently happens that people who have driven for very many years have been doing so without offending against the provisions of the Act. That a man is a professional driver cannot, as it seems to me, by any possibility be called a special reason. The fact that drivers are professional drivers would of itself indicate that they are more likely to be habitually on the roads than people who drive themselves, so there is all the more reason for protecting the public against them. By exercising discretion in favour of an offender because he is a professional driver or merely because he drives himself for business purposes, it is obvious that the court is taking into account the fact that in such cases disqualification is likely to work greater financial hardship than in the case of a person who uses his car for social or casual purposes. There is no indication in the Act that Parliament meant to draw any distinction between drivers who earn their living by driving or who drive for purposes connected with their business and any other users of motor cars. That in many cases serious hardship will result to a lorry driver or private chauffeur from the imposition of a disqualification is no doubt true, but Parliament has chosen to impose this penalty and it is not for courts to disregard the plain provisions of an Act of Parliament merely because they think that the action that Parliament has required them to take in some cases causes some or it may be considerable hardship. Had Parliament intended that special consideration was to be shown to professional drivers or first offenders it would have so provided.

As I have already said, the reasons given in this case are of the most general description and cannot by any possibility be construed as amounting to special reasons. If anything were

needed to make the intention of Parliament clearer than it is, it can be found by comparing the provisions as to the endorsement of licences for exceeding the speed limit in the Motor Car Act, 1903, now repealed and replaced by s. 5 of the Act of 1934. Under the Act of 1903, it was expressly provided that a licence should not be endorsed for a first or second offence. That indulgence is no longer given in the Act of 1934, which requires endorsement on any conviction for exceeding the speed limit, unless special reasons are found for refraining from taking that course.

What then can be said to be a special reason beyond saying that it must be one that is not of a general character? This was expressly considered by the King's Bench Division of Northern Ireland in the case of *R. v. Crossan* (1). In that case the court adopted a test that I had ventured to use in an address that I gave to the magistrates assembled at the Summer Assizes for Essex in 1937. I suggested that the reasons must be special to the offence, and not to the offender and the court in adopting what I had said used these words: "A 'special' reason within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a 'special reason' within the exception."

I respectfully and entirely agree with and adopt this passage. While it is impossible to enumerate or define everything that can amount to a special reason, one may give as an illustration a driver exceeding the speed limit because he has suddenly been called to attend a dying relative or a doctor going to an urgent call. It is difficult indeed to visualize any special reason in the case of dangerous driving, except the one actually mentioned in the section itself, namely, the lapse of time from the date of a previous conviction. So, too, it is certainly difficult to visualize what could amount to a special reason in the case of driving under the influence of drink or drugs, though perhaps one might be found if the court was satisfied that a drug had been administered to a driver without his knowledge, as for instance where a driver had taken a dose of medicine which he believed to be an ordinary tonic but which in fact contained a powerful drug.

(1) [1939] N. I. 106.

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The same conclusion as was reached by the High Court of Northern Ireland has been come to in the High Court of Justiciary in Scotland in the cases of *Muir v. Sutherland* (1), *Adair v. Munn* and *Adair v. Brash* (2), and in my opinion magistrates both in quarter and petty sessions must take it to be the law that no considerations of financial hardship or of the offender being before the court for the first time, or that he has driven for a great number of years without complaint, can be regarded as a special reason within these sections.

The justices in this case have stated though they can hardly have meant it as a special reason that as they were refraining from disqualifying they imposed a heavier fine. With all respect to them there is no warrant for taking any such course. It is the very converse of what they are entitled to do. The Act has left the penalty whether of fine or imprisonment entirely in the court's discretion. It is therefore open to them, if they see fit, to mitigate the penalty because disqualification will follow, but there is nothing in the Act to entitle them to substitute a more severe penalty as the price of refraining from disqualifying the offender.

Although this case is not concerned with s. 35 of the Act of 1930, which deals with disqualification for driving or allowing a vehicle to be driven when the owner or driver is uninsured against third party risks, it appears that in Scotland there has been some divergence of opinion among the Lords of Justiciary as to the tests to be applied in determining what in such cases would amount to special reasons—see *Murray v. Macmillan* (3), and *Fairlie v. Hill* (4). I do not propose to discuss those cases in detail because as the present case is not concerned with s. 35, any observations would really be obiter, but I may say for myself that I find it very difficult to apply any different test for construing the words “special reasons” in s. 35 from that which applies to s. 11 and s. 15. I confess that I think exactly the same considerations apply, and from the reasoning of the High Court of Northern Ireland it seems that they would take the same view. For myself, I would say that I strongly incline to the opinion that a person who drives or causes or permits a vehicle to be driven when there is no policy in force must be disqualified unless the court can find in relation to the particular offence some mitigating circumstance, and that mere forgetfulness or carelessness in not taking out a policy could not amount to a special reason.

(1) 1940 S. L. T. 403.

(3) 1942 S. L. T. 55.

(2) 1940 S. L. T. 414.

(4) 1944 S. L. T. 224.

In one of the Scottish cases the offender was a doctor whose services were urgently needed in war-time. It may perhaps be that in a national emergency such as was caused by the late war, overwhelming considerations of public benefit might be taken into account and amount to a special reason, but in ordinary circumstances I should find it difficult to hold that the fact that the offender was a doctor was any ground for treating him differently from any other driver. Had the legislature intended different treatment for medical men it would have said so. As announced at the close of the hearing, all the members of the court were of opinion that none of the reasons stated by the justices were special reasons, and accordingly we directed that the case should go back with that intimation and with a direction that the court should impose a disqualification for at least twelve months.

Before parting with this case I desire to say a word with regard to the action taken by the justices in regard to the second of the two informations to which the respondent pleaded guilty and which they dismissed under the Probation of Offenders Act. No case was asked for with regard to this second charge, though the justices refer to it in the case they have stated. The offence of dangerous driving is one of a serious character. A man should certainly not be convicted of that offence unless the court is completely satisfied that he has so driven as to endanger the public. If he has, he has put the lives and limbs of others of His Majesty's subjects in peril and deserves severe punishment, and it is difficult to understand how any court can consider this as other than a serious crime. I cannot believe that such an offence as this is one which should ever be dealt with under the Probation of Offenders Act. I agree that the words of the Act are very wide. The court can have regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed. Character, antecedents, age, health or mental condition really have nothing to do with such an offence as driving to the danger of the public, and it must be seldom indeed that extenuating circumstances can be found for it; moreover, when the offender admits, or it is proved that he was drunk at the time, it is obviously a matter of aggravation. Can it possibly be said that such an offence as this is one of a trivial nature? The Probation of Offenders Act replaced s. 16 of the Summary Jurisdiction Act, 1879, so far as it enabled the court

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to dismiss an information on the ground that the offence was trivial. There are many cases under the Act of 1879 in which this court has corrected the decisions of justices on the subject whether an offence can be regarded as trivial, and for myself I should certainly have done so here if the case had been stated in respect of that charge. I can only express the hope that in future no court will regard the offence of dangerous driving as one suitable for the application of the Probation of Offenders Act unless in the most exceptional circumstances.

LEWIS J. I agree, and have nothing to add.

OLIVER J. I agree.

*Appeal allowed.
Case remitted.*

Solicitors for appellant : *Sharpe, Pritchard & Co. for M. P. Pugh, Birmingham.*

R. F. S.

C. A.

ROYSTER v. CAVEY.

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Nov. 11.

Scott,
Bucknill and
Somervell L.JJ.

Tort—Action for—Action against defendant nominated by Government department—The Crown the real defendant—Nominated defendant not occupier of factory and not responsible for accident—Defendant owed no duty to plaintiff—Jurisdiction of court to entertain action.

The plaintiff, who was employed in a munitions factory in the occupation of the Ministry of Supply, suffered an injury while on the factory premises. She brought an action to recover damages for her injuries against the defendant whose name was supplied by a government department as being the proper person against whom to bring the action. In her particulars of claim she alleged that he was the occupier of the factory and had been negligent and guilty of a breach of statutory duty. The county court judge held that she had not made out her case. In fact it was admitted by the plaintiff's counsel in opening her appeal, that the defendant was not the occupier of the factory; that he had nothing to do with the accident; that he had not been negligent nor guilty of any breach of statutory duty, and that he owed no duty of care to the plaintiff:—

Held by the Court of Appeal that they had no jurisdiction to hear the appeal, having regard to the observations of the members of the House of Lords in *Adams v. Naylor* [1946] A. C. 543, 550,

552, 555, that in order that an action might be brought against a defendant nominated by the Crown the defendant must himself owe some duty to the plaintiff.

Observations in *Adams v. Naylor* [1946] A. C. 543 applied and followed.

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APPEAL from the Rotherham county court.

The plaintiff was employed in a Royal Ordnance Factory near Rotherham which was in the occupation of the Ministry of Supply. On the morning of December 9, 1944, just before 7 a.m., while it was still dark, the plaintiff was making her way from the part of the premises where persons employed had to clock in, to the part of the premises where she was going to work when she fell into a trench which had been dug across the road along which she had to walk, and was injured. She brought an action in the county court to recover damages for her injuries, alleging in her particulars of claim that the occupier of the factory had been guilty of negligence and want of care with regard to the trench in that it was neither fenced nor lighted and that she had not been warned of its existence. She also claimed in the alternative that there had been a breach of statutory duty under s. 26, sub-s. 1, of the Factories Act, 1937, which provides that "there shall so far as is reasonably practicable be provided and maintained safe means of access to every place at which any person has at any time to work." To this action the superintendent of the factory who had been nominated by the Minister of Supply as the person against whom the action should be brought was made defendant.

The county court judge held that the plaintiff had not proved that the occupier had been guilty of want of care in regard to the position in which the trench was dug or that it was unfenced or unlit, or that there had been a breach of statutory duty in not providing and maintaining safe means of access to the place where the plaintiff had to work.

The plaintiff appealed.

Fox-Andrews K.C. and *R. Cleworth* for the appellant.

J. F. Drabble for the respondent.

[In the course of the opening speech of Mr. Fox-Andrews Scott L.J. asked what the defendant who was described in the particulars of claim as the superintendent of the factory had to do with the accident or whether he was merely a nominal defendant.]

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Fox-Andrews K.C. replied that the defendant was a nominal defendant whose name had been supplied to the plaintiff by the Treasury Solicitor as being the proper person against whom to bring the action. He, however, had nothing to do with the accident ; he was not the occupier of the factory ; he had not been guilty of any negligence nor of any breach of statutory duty.

[SCOTT L.J. then referred to the observations made by the learned Law Lords on this point in *Adams v. Naylor* (1). How can this court continue the hearing of this appeal having regard to those observations ?]

Fox-Andrews K.C. Those observations were not necessary for the decision of *Adams v. Naylor* (1) and must be regarded as obiter. But if this court considers it is bound to follow the principle enunciated by their Lordships in those obiter observations I would ask the court to adjourn the case sine die to see whether the promise made by the law officers of legislation to enable actions to be brought against the Crown is carried into effect.

J.F. Drabble, the Treasury Solicitor on behalf of the defendant does not desire to take the point ; he would prefer that this appeal should be heard and decided on its merits.

✓ SCOTT L.J. In view of the observations made by the learned Law Lords in *Adams v. Naylor* (1) the court does not think that it has jurisdiction to continue the hearing of the appeal on its merits. [His Lordship stated the facts, and continued :] The defendant to the proceedings could not be the Ministry of Supply, which was the occupier of the factory, because that ministry, like every other government department, is simply in law the Crown, and in English law an action for tort, such as an action for negligence or breach of a statutory duty of this type, does not lie against the Crown. For that reason a practice has grown up in this country over a long period of years under which an action has been facilitated by the government department concerned allowing the action to proceed against some named person who in truth was representing the department and may or may not have been concerned in the particular accident that caused the damage or injuries in respect of which the desired action was to be brought. That applied both at common law in actions of negligence, and also in admiralty when a King's ship had been involved in a collision with the

(1) [1946] A. C. 543, 550, 552, 555.

plaintiff's ship. In admiralty the name of the commanding officer has usually been given by the Admiralty which, of course is a department of state representing the Crown. In admiralty—and I say this in order to illustrate the importance of the point—many different acts or defaults or omissions may contribute to a collision that has taken place. It may be the “look-out,” it may be the engine room, it may be the man who is at the wheel steering, it may be the navigating officer, it may be some defect in the machinery of the ship; all sorts of people may in fact be concerned in the cause of the collision. In admiralty the system was adopted, and it has continued until recent times that the commanding officer should be sued as the defendant. In all these cases where a name was given by a government department, the government department paid the damages and costs, if judgment was given in favour of the plaintiffs and all worked well; but it was, in law, a fiction.

In the case of *Adams v. Naylor* (1) a case of the kind came up before the House of Lords on appeal from the Court of Appeal in which I happened to be presiding. There two boys playing on the sand hills south of Southport on the Lancashire coast, strayed on to what was in fact a minefield put there for defence against the enemy. A mine exploded; one boy was killed and the other seriously injured. The House of Lords held that there was no cause of action because it had been taken away by the Personal Injuries (Emergency Provisions) Act, 1939; but, having said that, all their Lordships expressed their views on the practice of giving a name of a nominal defendant in order to facilitate what, from the moral point of view as distinct from the legal, may be regarded as in favour of justice being done, so that if the plaintiff proves that he has suffered an injury in such circumstances as would, if the defendant had been a private person or private company, entitle him to recover damages, he should not be deprived of that right by the accident of our law, that no action of tort lies against the Crown. Their Lordships pointed out that if the particular name given is the name of a person who is personally liable for the accident in question, then of course judgment might be given against him, but only if the defendant is a person who occupied that capacity. In admiralty actions, for the reasons I have given, it is often very difficult for the owners of the other ship to know who was the person who was responsible for the bad navigation of the King's ship that caused the collision. In the case of factories occupied

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C. A. by the Crown the same difficulty arises ; it is very difficult to know whom to sue.

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In the present case a name was furnished, and the particulars of claim said that the defendant, whose name was given, was the occupier of the premises and that he was negligent. As a matter of fact, as Mr. Fox-Andrews very frankly admitted, the defendant so named had nothing whatever to do with the accident ; he was not the occupier of the premises ; he had not been guilty of any negligence, nor of any breach of statutory duty under the Act. Those allegations, that he did occupy that position and was so guilty were accepted by the defence to the extent of not raising the question of his personal position. That was before the decision of the House of Lords in *Adams v. Naylor* (1) and the Treasury there were following the ordinary practice. The present case is curiously analogous to the position in *Adams v. Naylor* (1) where the real question was whether the War Office were in occupation of the sand hills and were guilty of the charges made against them in the action, but an individual whose name had been furnished by the War Office was made the nominal defendant.

Quite early in the opening of the appeal to-day by Mr. Fox-Andrews on behalf of the injured plaintiff, against whom in the court below the learned county court judge had decided for reasons I will deal with in a moment, I noticed that the description of the defendant in the particulars of claim was " Superintendent of the Royal Ordnance Factory, Maltby, near " Rotherham." That made me ask at once what the superintendent had to do with the accident, or was he a merely nominal defendant ? Mr. Fox-Andrews very rightly said at once : " Yes, he was a nominal defendant, the name came from the " Treasury Solicitor." That at once raised the question what this court ought to do. The county court judge decided against the plaintiff on the facts, and Mr. Fox-Andrews was in the course of opening the appeal on the ground that there had been no evidence in the court below to justify the findings of the county court judge, and therefore I say what I do say absolutely without prejudice to the question of merits on the appeal. I will assume there were equal chances of Mr. Fox-Andrews succeeding on the appeal or of Mr. Drabble having succeeded for the respondent in answering Mr. Fox-Andrews' arguments.

That is not the question. The point is that the appeal could not succeed, for this court cannot enter judgment in favour of the appellant without transgressing the principles

(1) [1946] A. C. 543.

expressed by the members of the House of Lords in *Adams v. Naylor* (1). Lord Simon referred expressly to the practice. He said (2): "But it is to me somewhat surprising and, I think, misleading, to refer to him, as the evidence does, as 'the 'nominal' or 'nominated' defendant. Such language seems to suggest that the issues at the trial are really issues between the plaintiffs and the Crown and that the defendant is mentioned as a party merely as a matter of convenience. That is not the true position. The courts before whom such a case as this comes have to decide it as between the parties before them and have nothing to do with the fact that the Crown stands behind the defendant. For the plaintiffs to succeed, apart from the statute, they must prove that the defendant himself owed a duty of care to the plaintiffs and has failed in discharging that duty." The other noble Lords agreed and Lord Uthwatt put it very strongly; he added this (3): "The noble and learned Lord on the woolsack has emphasized that the establishment of a duty owed by the defendant to the plaintiffs was essential to the plaintiffs' success in the action and, with my noble and learned friend, Lord Simonds, I express my complete concurrence with his observations. It was not open to the parties to this suit by agreement to have the matter dealt with on the footing, proved to be false, that the defendant was in occupation of the land in question. The matter could not be dealt with on the basis wished by the Crown." That wish by the Crown has been stated to the court by Mr. Drabble for the respondent here. The Treasury Solicitor instructing him, both before and since the decision in *Adams v. Naylor* (1) in the House of Lords, says he has no desire to take that point against the appellant; he would like to see the appeal disposed of on the merits. That being the position what is the duty of this court? I think the effect of what the House of Lords said is that this court has no jurisdiction to continue the hearing of a case where the cause of action alleged against a defendant is in truth not against the real defendant but against a name furnished for the purpose of trying an issue by agreement between the parties. It is true that in *Adams v. Naylor* (1) the House of Lords had decided the appeal on the footing that the accident in that case was covered by the Personal Injuries (Emergency Provisions) Act, 1939, and that to that extent it may be said that the passages I have read, in

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(3) *Ibid.* 555(2) *Ibid.* 550

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which all the members of the House concurred, were not necessary for the decision, which could ex hypothesi have been decided solely on the other basis ; but I think it is the duty of this court to treat those opinions, whether obiter or not, as an expression of principle, which this court ought to follow.

What is the public position resulting from that conclusion ? For this purpose I will assume that Mr. Fox-Andrews might have succeeded in his appeal and satisfied us that this poor woman had suffered an injury for which she was entitled to recover damages, or would have been entitled to recover damages against the Crown if the Crown had been liable. As it is she cannot, because the Crown is not liable in tort. What is the prospect ? For a long time past there has been a very strong argument in favour of the adoption by Parliament of legislation by which actions against the Crown in tort could be permitted, usually known as a "Crown Proceedings Bill." I had the honour of being a member of the committee that dealt with that matter twenty years ago and action on the line of that report has been awaited impatiently by a very large number of people in this country. As pointed out by Lord Simonds in *Adams v. Naylor* (1), on the instructions of Lord Haldane, when he became Lord Chancellor, an additional task was given to the committee, namely, to draft a bill. That we did. It may be that that bill could be amended ; it may be that it is good as it stands ; but the fact is that the complexity of modern business to-day, the number of government departments that are carrying on commercial concerns, the great increase of the activities of concerns representing the government, acting for the government, and owned by the government, makes it a crying evil, that that legislation should not be passed by Parliament. There have been recently answers to questions in both Houses of Parliament and it is said that many members of the government would like the legislation introduced. I recognize that the government has a very long list of measures to pass in this session, but I do desire to express the opinion as strongly as it is possible to express it, that it will be a crying wrong if that legislation is not introduced at an early date.

Mr. Fox-Andrews asked the court, if we felt bound to dismiss the appeal or not to hear it, simply to adjourn it in the hope that when legislation is introduced there may be a retrospective clause saving actions which had been started before the decision in *Adams v. Naylor* (2), but I pointed out to him that

(1) [1946] A. C. 543, 553.

(2) Ibid. 543.

it is no use to preserve this action by adjourning it. This action against this defendant could not succeed ; but I sympathize with Mr. Fox-Andrews that actions that have been started in the belief that the old voluntary practice of government departments should continue, might well deserve the consideration of Parliament whether they could not be saved from extinction. That would involve, of course, a reconsideration of the effect upon such actions of the Limitation Act and a consequent extension of time. Subject to those observations the court must dismiss this appeal and does not see its way to adjourn it.

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BUCKNILL L.J. I agree that this appeal must be dismissed. Mr. Drabble, counsel for the defendant, told the court that the defendant has given the Treasury Solicitor a retainer to defend him but that in fact the defendant is as nominal as he can be ; he had in fact no connexion with the factory at any material time. It may surprise the plaintiff that, in those circumstances, the case should have proceeded to trial and to judgment and even to this court. On the pleadings, the defendant, by his silence, impliedly admitted that he was the employer and the occupier of the factory, and the case was dealt with on that footing by the learned county court judge before the decision of the House of Lords in *Adams v. Naylor* (1). In truth the defendant was neither the employer nor the occupier of the factory and presumably if the defendant had lost the case before the county court judge, or on appeal, the State would have indemnified him against damages and costs. Now the House of Lords has dealt with a position almost identical in its main features with this case, and I need not read the speech of Lord Simon to which my Lord has already referred. The result is, in my view, that this court cannot pronounce judgment against a defendant when in truth and in fact he is not under any liability at all. I do not know who is liable in this case, if anybody. Prima facie it would be the employer of the plaintiff and the occupier of the factory ; that is, in other words, the Crown. As the law stands at present the plaintiff has no remedy against the Crown, and if she is to have a remedy for such damages as she has suffered, then it is for Parliament to give her that remedy by legislation.

SOMERVELL L.J. In dealing with claims against Crown

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servants, where the evidence shows that the acts relied on were acts in breach of a duty owed to the plaintiff by a particular servant of the Crown who could be identified and made a defendant, the position as I see it is unaffected by what was said in the House of Lords in *Adams v. Naylor* (1). In the present case, however—and this has already been referred to—it is not and cannot be suggested that the defendant here owed a duty or duties to the plaintiff, a breach or breaches of which gave rise to the claim. The claim is also based on duties which fall on an occupier, and the defendant clearly was not in law the occupier. The claim, therefore, as made is admitted to fall within what was said by the noble and learned Lords in *Adams v. Naylor* (1). Although, as has been pointed out, those observations were not necessary to the actual decision in that appeal it seems to me when their Lordships—and all of them either took this course or concurred—lay down principles in general terms it is the duty of this court to follow them.

We were invited to adjourn this case instead of dismissing it, on the assumption that if there was future legislation it might be easier or more practicable to deal with cases of this kind if they were adjourned than if they were dismissed. I am not, myself, sure that that would be so, but in any event I think it is too speculative to justify the court in refusing to do what, as I understand, the House of Lords has said must be done.

Appeal dismissed.

Solicitors for appellant : *Gibson & Weldon for John Whittle, Robinson & Bailey, Manchester.*

Solicitor for respondent : *Treasury Solicitor.*

R. F. S.

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Nov. 14.

Scott,
Bucknill and
Somervell L.JJ.

SOPHIAN v. A. J. CLIFFORD & SON.

County court—Practice—Judgment for more than 50l.—Bankruptcy notice issued and served—Act of bankruptcy—Restoration by debtor of adjourned application in county court for payment of debt by instalments—Necessity of notice to judgment creditor—Creditor's intention to file petition in bankruptcy—Jurisdiction of court—County Court Rules, 1936, Or. 24, r. 18.

After a bankruptcy notice in respect of a judgment in the county court for more than 50l. had been issued and served on a judgment

debtor, the debtor, who, by failure to comply with the notice, had committed an act of bankruptcy, restored an adjourned summons in the county court for payment of the debt by instalments, but not on notice to the judgment creditor. The county court judge made an order that the debt should be paid by instalments of 8*l.* a month:—

Held, that the order should be set aside on the ground that the county court judge had no jurisdiction to make it, without notice to, and in the absence of, the judgment creditor.

Per SCOTT L.J. The right to proceed for payment by instalments in the county court is very valuable; it enables a plaintiff to get his money in the easiest way from the defendant; but where on a judgment debt for a substantial amount there has been a bankruptcy notice served on the debtor with a resulting act of bankruptcy and the creditor proposes to file a petition in bankruptcy, he is entitled to exercise the right which the law provides.

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APPEAL from Bloomsbury county court.

Judgment was entered at that court for the plaintiff for a sum including costs amounting to 133*l.* 1*9s.* 2*d.* on March 5, 1945. The sum of 12*l.* only having been paid by the judgment debtors on January 27, 1946, a bankruptcy notice was issued against them for 121*l.* 1*9s.* 2*d.*, and it was served on them on January 31, 1946. The debtors failed to comply with the notice, and thus on February 8 committed an act of bankruptcy. On that day the judgment debtors took out a summons in the county court returnable on February 19, under r. 18 of Or. 24 of the County Court Rules, 1936, on notice, asking for an order that the debt should be payable by instalments. The county court judge adjourned the summons for a month to enable the creditor to file a bankruptcy petition. No bankruptcy petition was filed and the debtors restored their summons for March 21, for an order that the debt should be paid by instalments, but this they did not do on notice, and no notice was given to the judgment creditor by the court. On that day, in the absence of the creditor, the county court judge made an order for payment of the judgment debt at the rate of 8*l.* a month. On May 2, the creditor filed a petition in bankruptcy against the debtor, when he first discovered the existence of the order for payment of the debt by instalments. The petition came before the registrar in bankruptcy on May 31, who adjourned the hearing to give the creditor time to deal with the matter. On June 24, the creditor applied to the county court to set aside the order of March 21, but the deputy county court judge

C. A. refused the application. The creditor appealed to the Court of Appeal.
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T. H. Tilling for the judgment creditor. By r. 18 of Or. 24 of the County Court Rules an application by the judgment debtor for payment of a judgment debt in a lump sum by instalments must be made "on notice" and that must mean on notice to the judgment creditor. So where he restores such a summons, which has been adjourned, it must be made on notice to the judgment creditor. Here the judgment creditor received no notice of the adjourned summons heard on March 21 either from the debtor or the court and so the judgment creditor was not present at the hearing of the summons. The county court judge, therefore, had no jurisdiction to make the order for payment by instalments and the deputy county court judge should have set aside that order on June 24. See Or. 37, r. 2 and Or. 24, r. 19, of the County Court Rules, 1936.

The judgment creditor's rights to proceed in bankruptcy against the debtor were prejudiced by the order that the debt should be paid by instalments, since by s. 4, sub-s. 1, of the Bankruptcy Act, 1914: "A creditor shall not be entitled to "present a bankruptcy petition against a debtor unless " (b) The debt is a liquidated sum, payable either immediately "or at some certain future time." This debt, after the order of March 21, was not a liquidated sum, payable either immediately or at some certain future time and it was on that ground that the Registrar in Bankruptcy adjourned the hearing before him on May 31. Since three months have elapsed since the act of bankruptcy on February 8, the judgment creditor cannot bring a fresh petition grounded on that act of bankruptcy. See s. 4, sub-s. 1 (c) of the Bankruptcy Act, 1914. On this ground also the county court judge had no jurisdiction to make the order for payment by instalments. The judgment debtors were not represented.

SCOTT L.J. This is a case in which the order of the deputy county court judge under appeal must have been made per incuriam. In my view, the county court judge, having made the original order for payment of a lump sum, became bound thereafter not to make any order under the power conferred by the rules of the county court for payment by instalments without notice to the creditor; and, if the creditor appeared, not without hearing him upon the debtors' application. Order 24,

r. 19, of County Court Rules, 1926, provides : " If it appears " to the court that the person liable under any judgment or " order for payment by instalments is able to pay the sum " ordered to be paid, either in one sum or by larger instalments " than those ordered, the court may, on the application of the " person entitled to enforce the judgment or order made, on " notice, order the amount unpaid to be paid in one sum or by " larger instalments than those previously ordered, and may, " from time to time, vary such order." It is clear from that provision that the deputy county court judge had ample power to revise the order which had been made for payment of this very substantial debt by instalments ; but, for some reason, he refused to make any alteration in the order. The appeal is from that refusal.

In my view, it is clear that the county court judge ought never to have made the original reduction from a lump sum immediately payable into a series of small instalments payable over a period of time without hearing both sides. He ought to have preserved for the creditor the right that he had under the law to proceed by bankruptcy petition with a view to bankruptcy. When the creditor came back and asked for the order to be rescinded, in my opinion he was entitled to it *ex debito justitiæ* having regard to the mistake that had been made by the court ; and why the deputy county court judge should refuse to do it in those circumstances I do not understand. The right to proceed for payment by instalments in the county court is very valuable ; it enables a plaintiff to get his money in the easiest way from the defendant, but, where on a judgment debt for a substantial amount, there has been a bankruptcy notice served on the debtors with a resulting act of bankruptcy, and the creditor proposes to file a petition in bankruptcy, he is entitled to exercise the right which the law provides. I can see no grounds either in justice or in discretion for the order which was made, and it must be reversed. The order of March 21, also must be set aside, leaving the judgment standing and the bankruptcy notice as effective, as it was originally, when it was served. The appeal is allowed.

BUCKNILL L.J. I agree that this order should be set aside. The court is in rather a difficult position because the debtors are not here and the creditor was not present when the order for payment by instalments was made, but it is clear that there was a miscarriage of justice, and that a very important right of the

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creditor was stultified by this order of the county court judge, which was made in the absence of the creditor and without any notice that the application would be heard. I am also influenced by the fact that I am told that, if the debtor has got any merits which would justify suspension of the payment of the full amount and an order for payment by instalments, he can raise that matter before the Registrar in Bankruptcy, who may postpone the receiving order to see how the debtor shapes. I agree that this appeal should be allowed.

SOMERVELL L.J. I agree. In this case it seems to me clear that the order must be set aside for the reasons that have been given. As the other side are not here and there are other considerations which justify the conclusion to which the court has come, I do not propose to say anything about Mr. Tilling's interesting submission that the county court judge had no jurisdiction to make the order which he did, apart from the fact that no notice was given by the judgment debtors to the creditor on restoration of the summons for payment by instalments. That question as to jurisdiction can be considered if, on the facts in some other case, it is necessary to decide it. Mr. Tilling said he thought there was some doubt under the rules of practice as to what was the position when a summons or application of the kind which was made on February 19, 1946, to the county court judge was then restored by one party or the other. The trouble here has arisen from the fact that the creditor did not receive notice of the summons being restored by the debtors. There is no reason to suppose anybody acted improperly. The debtors' solicitor may have thought the court would give the creditor notice. If Mr. Tilling is right in saying that there is some doubt under the rules, it might be considered whether it would be desirable to make it clear that the party restoring the application must give notice to the other side.

Appeal allowed.

Solicitors for the judgment creditor : *Elkin & Co.*

C. G. M.

HOUSEHOLD MACHINES LIMITED v. COSMOS EXPORTERS LIMITED.

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Oct. 28, 29

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Nov. 1.

Lewis J.

Contract—Sale of goods—Goods purchased for re-sale—Breach by non-delivery—Remedies—Declaration of indemnity.

The plaintiffs entered into a series of contracts for the supply to the defendants of certain goods which were, to the plaintiffs' knowledge, intended for re-sale by the defendants to exporters. The plaintiffs failed to deliver some of the goods and the defendants declined to make any payments for those goods which the plaintiffs had delivered until the question of the undelivered items was settled. The plaintiffs thereupon brought an action for the price of the goods delivered and the defendants counterclaimed for damages for non-delivery of part of the goods subject to the contracts and for a declaration of indemnity in respect of any damages which they might be liable to pay to the person to whom they had contracted to re-sell the goods :—

Held, that the defendants were entitled to damages for breach of contract based on their loss of profit and to a declaration of indemnity limited to such damages as might be found to be legally due from the defendants to a subsequent purchaser as a result of the non-delivery by the plaintiffs.

ACTION.

The plaintiffs in 1945 entered into a series of contracts with the defendants for the supply to the defendants of certain articles of cutlery and table ware. The articles were, to the knowledge of the plaintiffs, intended for re-sale by the defendants to exporters. Owing to difficulty in obtaining supplies from the manufacturers, the plaintiffs failed to deliver some of the articles to the defendants, although a considerable proportion of the articles ordered was delivered in accordance with the contracts. On August 17, 1945, the defendants wrote to the plaintiffs a letter in which they said : " We are greatly surprised to receive notice to the effect that you will be unable to fulfil delivery of the table spoons and forks to our orders Nos. 741, 770 In view of the fact that you failed to notify us when accepting the orders that part thereof could not be delivered, we must hold you responsible for complete delivery under these contracts." The plaintiffs having requested payment for the items actually delivered, the defendants wrote to the plaintiffs on August 30, 1946, as follows : " We confirm receipt of your registered letter dated August 28 and should like to inform you that we have deposited the

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" amount of 339*l.* 12*s.* 0*d.* on a special account with Westminster Bank Limited for deliveries effected up to date and as invoiced by you. You can dispose of this amount as soon as the matter under consideration has been settled. In any case, the reason for our non-payment of your invoices up till now lies in the fact that we have a claim against you. We can assure you that the non-payment on our part does not constitute a breach of agreement, and we certainly cannot agree that, owing to our non-payment, you are entitled to stop further deliveries."

The defendants having failed to make any payment for any of the articles delivered, the plaintiffs commenced this action claiming their price. The defendants counterclaimed for damages for non-delivery of part of the goods subject to the contracts and for a declaration of indemnity in respect of any further damages which they might be found liable to pay to one Sasha to whom they had contracted to re-sell the goods.

O'Malley for the plaintiffs.

Hallis for the defendants.

LEWIS J. The plaintiffs, in answer to the counterclaim, have raised the question whether or not the defendants repudiated the contracts. I appreciate that repudiation, before it is of any avail, has to be accepted by the other side. Authorities have been cited to me, which are binding on me, but the question whether there has been repudiation depends on the facts of each particular case. That was laid down by Lord Selborne L.C. in *Mersey Steel & Iron Company v. Naylor, Benzon & Company* (1), where he said: "I am content to take the rule as stated by Lord Coleridge in *Freeth v. Burr* (2), which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part." Other cases cited to me, of which *Heyman v. Darwins, Ltd.* (3) and *Maple Flock Co., Ltd. v.*

(1) (1884) 9 App. Cas. 434, 438.

(3) [1942] A. C. 356.

(2) (1874) L. R. 9 C. P. 208.

Universal Furniture Products (Wembley), Ltd. (1) are examples, lay down no new principle, but only the principle enunciated by Lord Coleridge and approved by Lord Selborne in the *Mersey Steel & Iron Co.'s* case (2). I am entirely unable to say that the letters of August 17 and 30, 1945, written by the defendants and relied on by the plaintiffs in the present case constitute any repudiation of the contracts by the defendants.

The question then arises what the defendants are entitled to recover in respect of the plaintiffs' breaches of contract. It is clear that the plaintiffs knew that the defendants were buying the goods with a view to re-sale, which, it must be assumed, means re-sale at a profit. Authorities have been cited to me showing that in cases where there is no market, as in the present case, the purchaser who has been disappointed and has not received delivery is entitled to recover, as it is put, his loss of profit on the re-sale. It has been contended by Mr. O'Malley that "loss of profit" is not quite the right expression, but that the disappointed buyer is really entitled to recover from the seller the value of the goods at the time when the breach occurs. In the present case goods of this description were extremely scarce and there were no other goods of the same quality to be obtained on the market. The value of the goods is said by Mr. Hallis to be the amount at which the defendants were able to sell them to Sasha, which was about 12 per cent. above the price which they had agreed to pay to the plaintiffs. In my opinion, the proper figure to name as the loss of profit is a certain percentage of that price, but I think the percentage claimed by the defendants is too high and that the proper figure should be 10 per cent. over the price agreed to be paid in each case for the goods by the defendants to the plaintiffs.

The defendants in this counterclaim ask further for a declaration of indemnity. They say that the plaintiffs knew that the purchase was for re-sale to exporters and that the plaintiffs are bound to indemnify them in respect of anything which they may have to pay Sasha and which may properly be passed on by the defendants to the plaintiffs. Mr. O'Malley has argued that such a declaration is unheard of. I venture to think that there is power in the court to grant such a declaration in a proper case. Indeed, the Rules of the Supreme Court seem to indicate that it is right to do so. The reason is obvious, namely, that if such a declaration could not be made there might, in some cases, have to be two bites at a cherry; in other words,

(1) [1934] 1 K. B. 148.

(2) 9 App. Cas. 434, 438.

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it would encourage multiplicity of actions. If I gave judgment in this action for a sum by way of damages to the defendants without taking into consideration the fact that there may be other damages due to the defendants from the plaintiffs arising out of what may be called the chain of contracts entered into, it seems to me that the defendants' claim would be finished. They could not bring another action, because they can only come once to the court in respect of the same breach of contract and they must therefore recover or fail to recover damages once and for all. It is said that Sasha has made a claim against the defendants, and has said: "Here is my claim, but I do not know yet whether it will be larger still when I am sued by my buyers." The material for deciding that claim is not before me. But if I rejected the prayer for a declaration, I might be doing a very serious injustice, because Sasha's buyers might claim from him in circumstances entitling him to hand on that claim or part of it to the defendants, and the defendants, then having had to pay, might be in law and on the facts of the case entitled to go against the plaintiffs. Therefore I propose to do what may be an unusual thing and order a declaration. But the declaration granted is not to be considered to be a declaration of an indemnity to pay anything except what could be adjudged by a court of law to be due from the defendants to Sasha and could be handed on to the plaintiffs.

[The following declaration was subsequently incorporated in the order of the court:—The defendants are entitled to recover from the plaintiffs such damages as in law are due from the plaintiffs to the defendants in respect of damages which the defendants may be held liable to pay and/or may reasonably pay in respect of the discharge of their legal liability to one K. Sasha in consequence of any breaches by them of contracts for the re-sale by them to K. Sasha of cutlery sold to them by the plaintiffs under the contracts referred to in the counterclaim in so far as such breaches are breaches of condition or warranty that the said cutlery was equal in quality to samples thereof supplied by the plaintiffs to the defendants or breaches of condition or warranty that the same were merchantable as the result of non-delivery of cutlery caused by the plaintiffs' failure to deliver the same to the defendants under the aforesaid contracts.]

Solicitors for plaintiffs : *Tarlo, Lyons & Co.*

Solicitor for defendants : *G. Edmund Hodgkinson.*

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Distinguished. INSALL v. NOTTINGHAM CORPN. [1948] 2 All E.R. 232.

Distinguished and observations of SCOTT, L.J., at p. 224, criticised. BLACK MILL, LTD. v. STRAKER. [1949] 2 All E.R. 919.

Distinguished. BLACK-MILL, LD. v. STRAKER [1950] 1 K. B. 348

Explained. INSALL v. NOTTINGHAM CORPN. [1949] 1 K. B. 261

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Landlord and tenant—Rent restriction—"Standard rent"—Dwelling-house subject to special statutory restrictions on September 1, 1939—Restrictions subsequently removed and Rent Restriction Acts becoming applicable—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-s. 1 (a)—Housing (Rural Workers) Act, 1926 (16 & 17 Geo. 5, c. 56), s. 3, sub-s. 1—Rent and Mortgage Interest Restrictions Act, 1939 (2 & 3 Geo. 6, c. 71), s. 3, sub-ss. 1, 2, sch. 1.

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Nov. 11, 12.

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Bucknill and
Somervell L.JJ.

A dwelling-house which had been reconstructed with the aid of a grant made under the Housing (Rural Workers) Act, 1926, was let to a tenant in 1938 at a rent of 7s. 6d. a week, that being the rent fixed by the local authority in accordance with the conditions imposed by that Act. In 1941 the house became unoccupied and later in the same year the landlord let the house to another tenant at 17s. 6d. a week and repaid the grant. Thereupon the Act of 1926 ceased to apply to the house, which became subject to the Rent Restriction Acts. For the purpose of those Acts the house was a new house by reason of its reconstruction in 1938. In 1946, the tenant claimed under those Acts to recover a sum which he alleged that he had overpaid in respect of rent, contending that on the proper construction of s. 12, sub-s. 1 (a), of the Act of 1920, as amended by the Act of 1939, the standard rent of the house was the rent at which it was let on September 1, 1939, namely, 7s. 6d. a week :—

Held, that the standard rent was the rent at which the house was first let after being freed from the restrictions of the Housing (Rural Workers) Act, 1926, namely, 17s. 6d. a week.

Per Scott L.J. The standard rent provisions of the Rent Restriction Acts do not prima facie apply to houses the rent of which is subject to different and special legislation.

Signy v. Abbey National Building Society [1944] K. B. 449 applied.

Wheeler v. Wirral Estates, Ltd. [1935] 1 K. B. 294 distinguished.

APPEAL from Caernarvon county court.

The defendant in the action was the landlord of a house in Caernarvonshire which he had purchased in 1936. At that time it was let at 2s. 6d. a week. In 1937 it was condemned as unfit for human habitation and a demolition order was made in respect of it. The defendant, however, carried out a complete reconstruction of the house at a cost of about 450*l.* in aid of which he applied for and received from the local authority a grant of 100*l.* under s. 2 of the Housing (Rural Workers) Act, 1926. In December, 1938, the defendant let the house to a tenant and in accordance with one of the conditions imposed

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by s. 3 of that Act (1) the rent was fixed by the local authority at 7s. 6d. a week. In March, 1941, the tenant gave up possession and the house was unoccupied until May 25, 1941, when the defendant let it to the plaintiff at 17s. 6d. a week. At about the same time the defendant arranged to repay to the local authority the grant of 100*l.* and that sum was in fact repaid in September, 1941. In 1946 the plaintiff commenced this action against the defendant under the Rent Restriction Acts, claiming 52*l.* as money overpaid as rent on the ground that the standard rent of the house was 7s. 6d. a week.

The county court judge found as a fact that the house became a new house for the purpose of the Rent Restriction Acts in consequence of its reconstruction in 1938, and held that it was excluded from the operation of those Acts so long as it was subject to the Housing (Rural Workers) Act, 1926, but that on repayment of the grant the Act of 1926 ceased to apply and the house became subject to the Rent Restriction Acts. He held, however, that on the proper construction of s. 12, sub-s. 1 (a), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Rent and Mortgage Interest Restrictions Act, 1939 (2) the standard rent of the house was the rent on which it was let on September 1, 1939, namely, 7s. 6d. a week.

The defendant appealed.

Gilbert Dare for the defendant. In 1939 the house was outside the provisions of the Rent Restriction Acts and did not

(1) Housing (Rural Workers) Act 1926, s. 3, sub-s. 1: "In the case of a dwelling in respect of which assistance has been given under this Act by way of grant the following conditions shall . . . apply in relation to the dwelling for a period of twenty years from the date on which it first becomes fit for occupation . . . (b) The rent payable by the occupier in respect of the dwelling shall not exceed the amount of the normal agricultural rent, increased by a sum equal to three per cent. of the amount by which the estimated cost of the works in respect of which assistance has been given exceeds the amount of the assis-

tance given by way of grant . . ."

(2) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (a), as amended by the Rent and Mortgage Interest Restrictions Act, 1939, sch. I.: "The expression 'standard rent' means the rent at which the dwelling-house was let on the first day of September, 1939, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said first day of September, the rent at which it was first let."

come within them until the grant was paid off in September, 1941, when the rent of the house was 17s. 6d. per week and that therefore is the standard rent of the house, being the rent at which it was first let under the Rent Restriction Acts. The right of a tenant to have the standard rent fixed for a house is a right in rem and not in personam: *Carter v. S.U. Carbuiretter Company* (1). Therefore regard must be had to the status of the house at the material time. In *Wheeler v. Wirral Estates, Ltd.* (2), where premises, when first let, belonged to the Crown and were subsequently sold, it was held that although the Rent Restriction Acts did not apply to such premises so long as they belonged to the Crown, the standard rent was the rent at which they were first let in fact; but there was no evidence in that case that the rent was restricted or otherwise affected by reason of the fact that the premises were let by the Crown. In *Signy v. Abbey National Building Society* (3), where a house was first let furnished and afterwards let unfurnished, it was held that the standard rent was the rent at which it was first let unfurnished, and Luxmoore L.J., who read the judgment of the court, said: "A letting of a dwelling-house completely furnished is a letting of something more than the dwelling-house, for it includes also the letting of the furniture in it." The same principle applies to the present case. The rent fixed while the house was subject to the Housing (Rural Workers) Act, 1926, was not a free rent, but a rent artificially depressed by reason of the conditions imposed by that Act. It would clearly be an injustice if the grant were paid off and yet the statutory restrictions on the rent were retained. This house had a distinct status under that Act until it was removed by the repayment of the grant, and so long as that status existed the rent was not a free rent but a special rent just as much as the rent of a furnished house is a special rent.

Krikorian for the plaintiff. The question is limited to the interpretation of s. 12, sub-s. 1 (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Act of 1939. That enactment refers to an unfurnished dwelling-house, which is the case here. *Signy v. Abbey National Building Society* (3) can be distinguished on the ground that in that case the house was let furnished at the material date. In *Wheeler v. Wirral Estates, Ltd.* (4) Lord Wright said: "As the Acts do not apply to the Crown, any letting by the

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(1) [1942] 2 K. B. 288.

(3) [1944] K. B. 449, 453.

(2) [1935] 1 K. B. 294.

(4) [1935] 1 K. B. 301.

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"Crown, it was contended, is to be disregarded for all purposes of the Acts ; indeed no evidence of letting is admissible, so it was said, until after the Acts have begun to apply on the determination of the Crown's interest or of any tenancy created by the Crown I do not think this contention can be justified." There is no distinction between that case and the present one and the words "local authority" might well be substituted for the word "Crown" in the above passage from Lord Wright's judgment. The Act of 1920 is a general Act and should be construed in its ordinary sense. If Parliament had intended the definition of standard rent to apply only to free lettings it could and would have said so. The construction placed upon that definition by the county court judge was right and should be upheld.

SCOTT L. J. The question of law which arises in this case is whether the provisions of s. 12 of the Act of 1920, as amended by the Act of 1939, compel the court to say that 7s. 6d., the rent fixed by the local authority for the purpose of the Housing (Rural Workers) Acts, was the criterion of the standard rent of this house within the meaning of that section. There is a finding of fact by the county court judge that the effect of the reconstruction of the house in 1937 was to make it a totally new house. There is, therefore, no question of going back to see what was the rent when the old house, which *ex hypothesi* had ceased to exist, was let at a half-a-crown a week. If the house let under the Housing (Rural Workers) Acts at 7s. 6d. is to be regarded, 7s. 6d. is the criterion ; but, if the Rent Restriction Acts refer only to the rent of a dwelling-house which at the time of the rent being first paid was a free house, so that the rent would *prima facie* afford a fair market criterion of the rental value of the house, then the court can have no regard at all to the time when the rent was 7s. 6d., for the house was not then free and its rent cannot be the standard. In that case it must have regard to the rent of 17s. 6d., which was the first rent of this house freely agreed between landlord and tenant, after the time when this house, a new house, became free from the restrictions of the Housing (Rural Workers) Acts.

That raises a question of first principle, upon which there is no direct authority, though there is authority which is relevant. In my view the Housing (Rural Workers) Acts impose a status upon the house in exactly the same sense as do the Rent Restriction Acts. That, I think, leads to the necessary conclusion of

law that the Rent Restriction Acts are not intended to apply to houses the rent of which is fixed within the Housing (Rural Workers) Acts. A somewhat similar question was dealt with by this court in *Neale v. Jennings* (1), in which the court considered the question whether the Rent Restriction Acts applied to houses governed by pre-existing Acts of, so to speak, special legislation. It was a case concerning a house within s. 59 of the Pluralities Act, 1838, which imposes conditions on the letting of rectories and buildings required for the convenience of the same. This court decided that the Rent Restriction Acts, being general Acts, did not apply to a house governed by special legislation of that kind on the principle of the maxim *generalalia specialibus non derogant*. That same principle applies, though in a different way, I think, to the Rent Restriction Acts. They constitute general legislation. The Housing (Rural Workers) Acts are special legislation. *Prima facie* general is not intended to override or to conflict with special legislation; and that, in my opinion, is the proper interpretation to be put upon the Rent Restriction Acts. Indeed, it is to a certain extent declared to be so by an express provision in s. 3, sub-s. 2 of the Act of 1939, which says: "The principal Acts shall not, by virtue of this section, apply," *inter alia*, "(c) to any dwelling-house being, or forming part of a house, or dwelling in respect of which a local authority for the purposes of Part V. of the Housing Act, 1936, are required by s. 128 of that Act to keep a Housing Revenue Account." That section of the Housing Act, 1936, deals first with houses which at any time have "been provided by a local authority," but also with "all dwellings in respect of which either (i.) the authority have received assistance under s. 1 of the Housing (Rural Workers) Act, 1926; or (ii.) the Minister has undertaken to pay a contribution to the authority under sub-s. 2A. of s. 4 of that Act." That section applies to the present case because here the local authority in respect of their grant were in receipt of assistance from the Minister as there provided. There is, therefore, in that enactment a declaratory recognition of the principle that the standard rent provisions of the Rent Restriction Acts *prima facie* do not apply to houses the rent of which is subject to different and special legislation. The judge dealt with that, but, in my view, he came to a wrong conclusion of law when he said that the Rent and Mortgage Interest Restrictions Act, 1939, made it obligatory upon him to take as the standard rent of the

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house, for the purpose of the Rent Restriction Acts, the artificial rent of 7s. 6d. fixed under the other legislation when the house was first let.

The court has been referred to several cases, and counsel for the plaintiff has relied particularly on *Wheeler v. Wirral Estates, Ltd.* (1), where Lord Wright gave the leading judgment of this court. In that case the house in question had been constructed and owned by the Crown and was let to the plaintiff at 9s. 6d. a week, subsequently reduced by the Crown to 7s. 2d. Subsequently the Crown had sold it to the defendants subject to the plaintiff's tenancy at the same rent of 7s. 2d. a week. In 1929, the defendants gave the plaintiff notice to quit with an alternative of an increase in the rent to 10s. 6d. The question before the court, under s. 12 of the Act of 1920, was what was the time when the house was first let within the meaning of the Rent Restriction Acts. The court held that the house was first let when it was let at the higher rent of 9s. 6d. The words particularly relied upon by counsel for the plaintiff are at the end of Lord Wright's judgment (2), where he said: "It is not, as I think, the law that property which while belonging to the Crown has obtained an immunity from conditions and charges under statutes which do not bind the Crown retains that immunity after the Crown's interest has ceased." I fail to see how that case helps the plaintiff. The only question in the present case is whether this house had a status, as long as it was within the Housing (Rural Workers) Acts, which prevented the Rent Restriction Acts applying. I think that the nearest analogy to this case is *Signy v. Abbey National Building Society* (3). There an attempt was made to treat the rent paid for the house when furnished as a criterion for the purpose of fixing the standard rent of the house when unfurnished. Luxmoore L.J. delivered the judgment of the court, consisting of himself, Lord Greene M.R. and MacKinnon L.J., and, speaking of s. 12 of the Act of 1920, as amended by the Act of 1939, he said (4): "The object is plainly to fix the standard rent of a dwelling-house to which the Acts apply"; and a little later: "A letting of a dwelling-house completely furnished is a letting of something more than the dwelling-house, for it includes also the letting of the furniture in it." He, therefore, held that a furnished house was not the kind of house to which the Act was to be applied for the

(1) [1935] 1 K. B. 294.

(3) [1944] K. B. 449.

(2) *Ibid.* 304.(4) *Ibid.* 453.

purpose of fixing the standard rent. That is analogous, in my view, to the case of a house which had an artificially low rent, because it was a house carrying the standard rent of the Housing (Rural Workers) Acts. I therefore think that the appeal must be allowed with costs here and below.

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. BUCKNILL L.J. I agree that the appeal should be allowed and, as we are reversing the judgment of the county court judge, I will try to state very shortly my reasons.

It seems to me that the crucial part of the judge's judgment comes where he said: "On September 10, 1941, the house "came within the provisions of the Rent Act, 1939, under "which the relevant date for ascertaining the standard rent is "September 1, 1939." In order to make that sentence intelligible so far as the facts are concerned, it is merely necessary to state that in 1938 the landlord rebuilt the house and made it a new house and in order to do that he obtained a grant of 100*l.* from the local authority. On May 25, 1941, he in fact let the house to the plaintiff at 17*s.* 6*d.* a week. Before that time the rent had been 7*s.* 6*d.* a week. It seems to me to be quite clear, as the judge has said, that under s. 3, sub-s. 2, of the Act of 1939, the house did not come within the provisions of the Rent Restriction Acts until this grant had been repaid. Then the question is: Was the judge right in saying that the relevant date in a case of this kind for ascertaining the standard rent is September 1, 1939? In my view that is incorrect, because this house was not within the meaning of the Act a dwelling-house which was let on September 1, 1939. Therefore it comes within the words of s. 12, sub-s. 1 (a), which deals with the case of a dwelling-house first let after September 1, 1939. In that case the standard rent is to be the rent at which it was first let. The rent at which it was first let after September 1, 1939, was 17*s.* 6*d.* a week and, in my view, that should be taken as the standard rent in this case. The county court judge has said that it should be 7*s.* 6*d.* a week. I think that that is wrong and that this appeal should be allowed.

SOMERVELL L.J. This house came into existence for the purpose of the Acts which we are considering as a result of the reconstruction made by the defendant under the Housing (Rural Workers) Act, 1926. It is common ground that he received a grant of 100*l.* under that Act. That being so, its rent was limited and fixed according to the provisions which are laid

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down in s. 3 of that Act, and, as a result of the application of those provisions, the local authority fixed the rent at 7s. 6d. That was in 1938.

In 1941, the house being then vacant, the defendant was minded to let it to the plaintiff. The plaintiff, by reason of the wages which he was getting, was thought not to come within the provision in s. 3, sub-s. 1 (a), of the Act of 1926, which puts an income restriction on those who may become occupiers of houses in respect of which grants have been received under that Act. The defendant, therefore, proposed to pay off the grant, having no doubt been informed of the second proviso to that sub-section, the final words of which are that, if the grant is paid off, "the conditions contained in this section shall cease "to have effect in relation to the dwelling." The defendant took the view that, if he paid off the grant, he would be entitled to charge a rent higher than the 7s. 6d. which had been fixed under the Act and he and the plaintiff agreed that the plaintiff should have the house at 17s. 6d. a week. I do not think that any importance can be attached to the fact that that agreement was made and the plaintiff entered into occupation some time before the grant was in fact paid off. The plaintiff now says that he need not pay 17s. 6d., but only 7s. 6d., on the familiar ground that 7s. 6d. should be regarded as the standard rent under the Rent Restriction Acts. This house having now ceased to be subject to the conditions of the Housing (Rural Workers) Act, 1926, I think that it is agreed that the Rent Restriction Acts apply; but the argument is as to what is the result of their application.

The argument of Mr. Krikorian on behalf of the plaintiff is quite a simple one. He turns to the definition in s. 12 of the Act of 1920, as amended, which says that the standard rent means, for the purpose with which we are concerned, the rent at which the dwelling-house was first let, and says that the house was first let at 7s. 6d. after the reconstruction and there is no reason why the words should not be given their literal meaning and applied in that way.

Mr. Dare drew our attention to two authorities. In *Wheeler v. Wirral Estates, Ltd.* (1), it was held that, although Crown premises are not subject to the Rent Restriction Acts, the rent which was fixed by and paid to the Crown when the house was first let was the standard rent to be taken as applicable to the house after it had passed from the ownership of the Crown into

other hands. In the other case, *Signy v. Abbey National Building Society* (1), this court held that, where the house was first let furnished, the rent which was then paid was not to be taken as the standard rent.

What then is the position so far as authority is concerned? This court cannot, I think, have decided *Signy's* case (1) on the basis that you do not take the furnished rent because the Acts do not apply to the letting of furnished houses, because it had already decided that you do take a rent payable to the Crown, although the Acts do not apply to Crown property. As it seems to me, the basis of the decision in *Signy's* case (1) is that a furnished letting is not the type of letting which is contemplated by the definition—not so much because furnished lettings are excluded from the Acts, but because such a letting necessarily contains an element increasing the rent, which is not included in the normal rent, it being a rent of unfurnished premises with which the Acts are concerned: in other words, the basis of a furnished letting is not the basis which the Acts are clearly contemplating in this definition. If I am right in saying that that is the ratio of the *Signy* decision, I must seek to apply it to this case. It seems to me that it can be said with equal force here that the basis on which a rent under the Housing (Rural Workers) Act, 1926, is arrived at is not the normal basis nor the basis which the Rent Restriction Acts are contemplating when in this definition they are laying down how the standard rent is to be arrived at. It is unnecessary to recapitulate in detail the restrictions or the conditions which affect the rent fixed under the Act of 1926, but just as the inclusion of furniture is an extraneous factor which operates by way of increasing the rent, so it seems to me that, to use Mr. Dare's expression, those restrictions and conditions depress the rent and, therefore, exclude it from the definition in s. 12 of the Act of 1920.

It cannot be said that in the case relating to Crown property there was any element which operated either to raise or to depress the rent which would ordinarily have been arrived at. The Crown may, of course, in connexion with housing for munition workers, charge a rent lower than the ordinary market rent for munition workers in time of war. There is, however, no indication as to that one way or the other in *Wheeler's* case (2); and the mere fact that the Crown owns property does not lead to the rent being other than what would normally be arrived at as between landlord and tenant.

(1) [1944] K. B. 449.

(2) [1935] 1 K. B. 294.

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It therefore seems to me that this case falls within the principle of the decision given in *Signy's case* (1), and I agree that this appeal should be allowed.

Appeal allowed.

Solicitors for defendant: *Jagues & Co., for Ellis, Davies & Co., Caernarvon.*

Solicitors for plaintiff: *Whitfield, Byrne & Dean, for Carter, Vincent & Co., Caernarvon.*

(1) [1944] K. B. 449.

H. A. P.

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SMITH v. PENNY.

1946

Nov. 13.

Scott,
Bucknill and
Somervell L.JJ.

Landlord and tenant—Rent restriction—Recovery of possession—House required by landlord “for occupation as a residence for himself”—Landlord unable to live on premises—Occupation by family—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32), sch. I. (h).

A landlord requires a house “for occupation as a residence for “himself” within the meaning of para. (h) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act 1933, if he requires it for the occupation of his wife and family, although he may himself be unable to live on the premises.

APPEAL from Worthing county court.

The plaintiff, H. C. Smith, was the tenant and manager of the Downland Hotel, Worthing, under an agreement made in April, 1943, with a firm of brewers, which contained a covenant by the plaintiff that he would not cease “personally and continuously “to reside upon the premises.” In 1943, the plaintiff purchased a house, No. 7, Beeches Avenue, Worthing, situated near the hotel, which he intended to use for the accommodation of members of the staff of the hotel after the war, but as the house was not immediately required, he let it to the defendant for the duration of the war. At the end of the war on May 5, 1945, the plaintiff asked for the return of the house but the defendant declined to leave. The plaintiff, who was permanently separated from his wife, had two children, aged ten and fourteen years. He was anxious that they should live in the house as being a more suitable residence for them than the hotel, and he arranged with a Mr. and Mrs. Caley, who were friends of his, that they should occupy the house and that Mrs. Caley should act as

housekeeper and look after the two children. On the defendant refusing to leave the premises the plaintiff took proceedings in the county court under s. 3 and para. (h) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (1), for possession of the house on the ground that he required it "for occupation as a residence for himself" within the meaning of para. (h). The county court judge held that the words "occupation as a residence for himself" were satisfied if the house was to be used as a family home for the landlord's wife and family, whether the landlord was compelled by the exigencies of his business to live elsewhere or not, and being of opinion that the other conditions of para. (h), including that of relative hardship, were satisfied in the plaintiff's favour, he gave judgment for possession. The defendant appealed.

Dutton Briant for the defendant. The county court judge was wrong in holding that in making provision for a residence for his children, "the dwelling-house was reasonably required" by the plaintiff "for occupation as a residence for himself" within the meaning of para. (h) of sch. I. to the Act of 1933. The plaintiff already had a residence in the hotel where he had expressed his intention of residing and where he was bound by the terms of his agreement, to reside; and there was ample accommodation there for his family. He, therefore, could not reasonably require another house for occupation as a residence "for himself." Under the terms of para. (h) he was not entitled to say that he required the house for his children living separately from him. The words "for himself" must be strictly construed

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(1) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sch. I.: "A court shall for the purposes of s. 3 of this Act have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (h) the dwelling-house is reasonably required by the landlord . . . for occupation as a residence for —

"(i.) himself; or (ii.) any son or daughter of his over eighteen years of age; or (iii.) his father or mother: Provided that an order or judgment shall not be made or given on any ground specified in para. (h) of the foregoing provisions of this schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it."

C. A. because the paragraph specifically deals with the case of a son
1946 and daughter over eighteen and with the father and mother of
SMITH the landlord. That being so "himself" must refer to the land-
v. lord personally, and not his family.
PENNY. *Curtis Raleigh* for the plaintiff was not called on to argue.

SCOTT L.J. stated the facts and continued: The first question that arises is this: under para. (h) of sch. I. to the Act of 1933, the occupation for which the house is wanted as a residence must be either that of the landlord himself, or of his son or daughter over eighteen years of age or of his father or mother. It was contended below, as it has been before us, that the words "for himself" must be strictly interpreted as meaning occupation for residence by the landlord personally, and cannot be interpreted as covering the case of his wanting the house as a family home, whether he lives in it himself, or whether being, for instance, obliged for the sake of earning his income, to live elsewhere, he cannot live in it. I think the latter is the right interpretation and that it is shown to be so, by the second of the two purposes mentioned in the paragraph, "or any son or daughter of his over eighteen years of age." It is quite impossible that the legislature could have put in that downward age of limitation, unless they had recognized that the word "himself"—the father and husband—necessarily included the children and the mother and wife, and it is sufficient to say that that is the interpretation which I put on the provision. I do not think that there is any authority directly on the point and I leave it at that. That being so the first defence put up by the defendant in order to prevent the judge from making an order for possession disappears. I think it is right that it should disappear. The family is the unit of our civilization. To keep the family together is of high public importance. Had there been no separation and the mother had been available, what I have been saying would have been directly in point. If, unfortunately, a separation takes place between husband and wife, this court ought to assume that it is a separation which is, in the circumstances, proper and unavoidable. No blame ought to be attributed to the husband who asks for a home for his children, because he has been separated from his wife in circumstances of which the court knows nothing and has properly not asked for information. I, therefore, deal with the question here as if the person available to look after the two young children had been the plaintiff's

wife. What the plaintiff did in fact was to arrange with a friend of his, a Mr. Caley, that he and Mrs. Caley should live in the house and that she should be paid as housekeeper to look after the children on terms to be arranged between the plaintiff and Mrs. Caley. She gave evidence before the court and the judge saw her and, I think, was satisfied that the plaintiff was proposing to make proper arrangements for the welfare of the family. That disposes of the main question in this case as I see it. [On the issue of hardship Scott L.J. held that there was evidence to support the conclusion at which the county court judge had arrived. The appeal would accordingly be dismissed.]

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BUCKNILL L.J. I agree that the appeal should be dismissed for the reasons given by my Lord.

SOMERVELL L.J. I agree. In order to succeed on this appeal it is necessary for the defendant to show that the county court judge misdirected himself on a question of law or that he based his judgment on some finding of fact of which there was no evidence. I will not repeat the facts which have been stated, including the terms which the plaintiff invoked under his tenancy agreement. I thought at one time that Mr. Briant might argue for the defendant that where a landlord is under an agreement by which he was bound to sleep and spend his working day in licensed premises, it was impossible for him, as a matter of law, to rely on para. (h) of the schedule and seek to show that he reasonably required the house for his wife and children, or if he has no wife, for his children. Mr. Briant, however, agreed with me that if the facts were that the premises, be they licensed or other premises, in which the landlord had to sleep, did not, as a matter of cubic feet, contain accommodation in which his wife and children could be accommodated, then the provisions of the paragraph were available to him, provided, of course, that he could satisfy the other conditions. In the present case, although as a matter of cubic feet there is accommodation in this hotel for the children, the plaintiff maintained in his evidence and I am clear that the county court judge accepted the view, that the hotel was not a proper place for these young children who had, for reasons which had been stated, no mother to look after them. In my view, on that basis, it cannot be said, as a matter of law, that the plaintiff cannot reasonably require the house for occupation as a residence for himself, the word

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"himself" clearly including wife and children. The matter seems to be entirely one for the county court judge on the evidence and I can imagine arguments of considerable force being put up on both sides in this case. In my opinion the county court judge came to his decision with a proper regard to the construction of para. (h) and I see no reasons why we should disagree with it.

Appeal dismissed.

Solicitors for the plaintiff: *Petch & Co. for Bowles & Stevens, Worthing.*

Solicitors for the defendant: *Burton, Yeates & Hart, for Charles, Malcolm & Wilson, Worthing.*

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M. & A. GOODMAN v. ELKINGTON AND BACKHOUSE.

Practice—Emergency legislation—War damage—Multiple lease—Disclaimer—Application by landlords to county court for determination of fitness of premises—Form of notice of application—Landlord and Tenant (War Damage) Act, 1939 (2 & 3 Geo. 6, c. 72), s. 6 and s. 15 (as modified by Landlord and Tenant (War Damage) (Amendment) Act, 1941 (4 & 5 Geo. 6, c. 41), Schedule.

No particular form of notice is required by the Landlord and Tenant (War Damage) Act, 1939, and the amending Act of 1941. A notice of disclaimer under s. 4 of the Act of 1939 being a notice that, by reason of war damage, the tenant seeks to escape from his lease altogether, a counter notice of application by the landlord is sufficient if it clearly brings to the attention of the court the landlord's contention that the facts of the case do not justify the disclaimer and consequent avoidance of the lease. Thus, where the tenants served a notice to disclaim a "multiple" lease the landlords replied with a notice of application to the court to determine whether the disclaimer was of no effect on the ground that the land comprised in the lease was not unfit, by reason of war damage, for the purpose of dwelling-houses, at the relevant time. The landlord's notice of application did not refer specifically to any section, but its wording was more in conformity with the wording of s. 6 of the Act of 1939 (which section does not apply to "multiple" leases) than with the wording of s. 15 of the Act of 1939, as amended by the schedule to the Act of 1941 (which does so apply). Nevertheless the notice of application was held to be a good notice.

APPEAL from decision of the judge of Bow county court on a preliminary point of law.

The parties were respectively the successors in title of the original grantors and grantees of a building lease for ninety-nine years, dated August 26, 1880, in respect of land in the borough of Poplar. The lease provided for the erection of three dwelling-houses, now known as Nos. 26, 28 and 30, Box Street. In between the years 1940 to 1944 damage was done to the said premises by enemy action, and on February 21, 1946, the solicitors of the present respondents (hereinafter called the tenants) served on the solicitors of the present appellants (hereinafter called the landlords) a notice of disclaimer under s. 4 of the Landlord and Tenant (War Damage) Act, 1939. On March 19, 1946, the landlords filed in Bow county court an application for an order or declaration that the notice of disclaimer was of no effect, on the ground "that the said land was not unfit for the purpose of dwelling-houses at the time when the said notice of disclaimer was served, having regard to all the circumstance and to the terms of the said lease, and that it would be inequitable to allow the respondents to disclaim the lease as a whole or in part, or in the alternative that if the said land was unfit for the said purpose at the said time it was not unfit by reason of war damage." On May 3, 1946, the landlords filed in the county court an "amended notice of application," by which they asked the court "to determine the question whether the respondents [tenants] should be allowed to disclaim the said lease either wholly or as respects one or more of the said separate tenements comprised therein or at all."

The matter came on for hearing before Judge Alchin on May 7, 1946, when on behalf of the tenants a preliminary point was taken that the landlords' notice of application of March 19 was made under s. 6 of the Landlord and Tenant (War Damage) Act, 1939, which had no application to multiple leases, and was therefore bad, and that the amended application was out of time and no extension of time was permissible under the Acts. On June 25 the learned county court judge delivered a reserved judgment, in which he held that the application of March 19 was in accordance with the procedure laid down in s. 6 of the Act of 1939 (1) and must therefore fail, the lease in question being

(1) Landlord and Tenant (War Damage) Act, 1939, s. 6: "Where a notice of disclaimer is served—
 (a) any person having an interest in or derived out of the term created by the lease to which the notice relates . . . may, at any time within one month from the service of the notice, apply to the court to determine whether the notice is of no effect on the ground that the land comprised in the lease was not unfit by reason of war damage at

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a "multiple lease," to which the procedure prescribed by s. 15, as amended by the schedule to the Act of 1941, and not that prescribed by s. 6, applied; that the "so-called amendment" filed on May 3 was in reality a fresh application and was out of time, not having been made within one month from the service of the notice of disclaimer as required by s. 15. He therefore dismissed the landlords' application and refused to extend the time for service of notice to avoid disclaimer. The landlords appealed.

Ronald Dow for the landlords. When a notice of disclaimer is served by a tenant three courses are open to the landlord. Firstly, he may do nothing, in which case after the expiry of a period of one month from the notice the lease is treated as being at an end. Secondly, he can serve a notice to avoid disclaimer. Then there is implied in the lease a covenant on the part of the landlord that the land—"land" covers any buildings—shall be rendered fit as soon as is reasonably practicable after the service of the notice to avoid disclaimer. Thirdly, he can apply to the county court, which can exercise its powers in the case of a "single" lease under s. 6 of the Act of 1939, and in the case of a "multiple" lease under s. 15 of that Act as modified by the schedule to the Act of 1941. The landlords in the present case took the third course. The lease in question is admittedly a multiple lease. The learned county court judge held that the landlords' first application of March 19 could be nothing but an

"the time when the notice was served."

Section 24: "'multiple lease' means a lease comprising buildings which are used or adapted for use as two or more separate tenements."

Section 15, sub-s. 1 (as modified by the schedule to the Landlord and Tenant (War Damage) Act, 1941): "In relation to a multiple lease, section six of this Act shall not apply and the other provisions of this part of this Act shall have effect subject to the modifications specified in this section."

"2. Where a notice of disclaimer, a notice of retention or a

"notice to elect is served with respect to a lease—(a) the person serving the notice or the person on whom it is served; or (b) any other person having an interest in or derived out of the term created by the lease . . . ; may apply to the court, within one month from the service of the notice to determine the question whether the tenant should be allowed to exercise the right of disclaimer or retention, either as respects the lease as a whole or as respects one or more of the separate tenements comprised therein, or should not be allowed to exercise that right at all."

application under s. 6. It is submitted that the learned judge was wrong in law. It is conceded that certain phraseology in the first application follows the wording of s. 6, but there is no reference in it to either s. 6 or s. 15. The question of the unfitness of the premises by reason of war damage is raised for determination in either section, and the landlords' first application is sufficient to satisfy the provisions of s. 15, and the judge below could have given relief to the applicants under it. The amended notice of application was not, as the learned judge has held, a fresh notice. The first notice did not require amendment, and the second notice was really something in the nature of further and better particulars. No form of notice is laid down by the Act of 1939: see per Lord Greene M.R. in *Price v. Mann* (1). The words "dwelling-houses" in the first application made it clear that the application was for relief in respect of a multiple lease, and the tenants were not misled because their notice of disclaimer refers to premises known as Nos. 26, 28 and 30, Box Street.

[*Cooper v. Jax Stores, Ltd.* (2) also referred to.]

H. C. Leon for the tenants. The counter notice of the landlords was in affect a pleading and the pleader was bound by it unless it were amended. There is quite a difference between applications under s. 6 and those under s. 15, and it is submitted that the landlords' first application could not succeed unamended. The pleader had apparently failed to appreciate that this was a multiple lease, but the landlords, realizing that the application was not in order, had served an amended notice. That was misconceived. The application here was an originating application (County Court Rules, Or. 6, r. 4). Leave to amend could have been applied for and the judge had power to allow amendment of what was an invalid application so as to make it valid, but no application for leave to amend was made and it is now too late. A notice which simply asks for relief in the words of s. 6, without any reference to a particular section is misleading, and does not make clear to the other side what relief is asked for.

SCOTT L.J., having stated the facts and read the relevant sections of the Act of 1939 and the material parts of the schedule to the Act of 1941, continued: Quite shortly, those provisions give jurisdiction to the court, if the notice of disclaimer is valid and within the Act, and if the notice of appli-

(1) (1942) 1 All E. R. 453, 454. (2) [1941] 1 K. B. 577.

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cation by the landlord to avoid the disclaimer is also valid and within the Act, to do substantial justice. The question in this case arises primarily on the content of the landlord's notice of application to the court, dated March 19, 1946, for a declaration that the notice of disclaimer was of no effect. In order to follow the position, a few dates are necessary. The date of the notice of disclaimer is February 21, 1946. On March 19, that is within one month of February 21, the application by the landlords to which I have just referred was served on the tenant's solicitors in accordance with the provisions of the Act. On May 3, the landlords filed what they called an "amended notice." On May 7 the application came on for hearing before Judge Alchin, and, on its coming on, counsel for the tenant took a preliminary objection that the second application was a fresh application and, not having been made within the month, was invalid. He further contended that the first application was not of itself sufficient unless the provisions of the second application were read into it. The court reserved judgment and on June 25 the learned judge upheld the tenant's contention that the second application was a fresh notice and that the first application was not sufficient to constitute a "notice" within the meaning of the Act, largely on the ground that he interpreted the first application as an application under s. 6 of the Act alone, and not under s. 15.

Important questions are, therefore, raised by this procedural appeal. Prima facie, under the Act, I cannot help feeling that the intention of Parliament was not to impose any particular duty as regards form. There is nothing in the Act of 1939, or in the Act of 1941, to require a particular form. The object of the legislation seems to me to have been to make provision interfering with the strict legal rights of landlord and tenant, as determined by their contractual instruments, and pre-war legislation, only so far as was necessary for the purpose of ensuring that, in the event of war damage, justice should be done as between landlord and tenant on the substantial facts of the position. For that reason I should have thought that Parliament intended the notices to be informal, provided always that they said sufficient to make clear what the intention of the notice was. A notice of disclaimer obviously is a notice that, by reason of war damage, the tenant seeks to escape from his lease altogether. The contrary application of the landlords must be regarded as intended simply to bring to the notice of the court his contention that the facts of the case do not justify

the disclaimer and consequent avoidance of the lease. If the two notices brought that issue sufficiently before the court, my view is that *prima facie* the intention of the Act was complied with. It is quite clear that after a notice of disclaimer, the landlord will lose his right to give a counter notice by application to the court, unless he does it within the statutory period of one month. That time limitation was deliberately made by Parliament in order to ensure that issues which depend on pure questions of fact shall be disposed of rapidly, in order that both parties to the relationship of landlord and tenant might know where they stood. It follows that the period of a month is a definite condition precedent to the right of the landlord to make his application.

In my view, the notice by the landlord served on the March 19 was a good notice. For the purpose of considering the meaning of such a notice the court must read into it everything that is reasonably imported by it, and should not apply any artificial theory of interpretation or technical test for its validity. The declaration asked for by the landlords was in the following terms : " That the notice of disclaimer in respect of a lease, dated the 28th day of August, 1880, and made between James Goodman and Josiah Goodman of the first part Arthur Holloway of the second part and Mary Watson of the third part is of no effect on the ground that the land comprised in the said lease was not unfit by reason of war damage at the time when the said notice of disclaimer was served." That notice appears to me to show that the landlord challenges the allegation of the tenant upon which his disclaimer was based. The landlords go on to say, though I think it was probably not necessary for them to add it : " The grounds on which we claim to be entitled to the said order or declaration are that the said land was not unfit for the purposes of dwelling-houses " at the relevant time. That describes the substantial position. The phrase " dwelling-houses " in the plural must be read in the light of the disclaimer, to which the application was an answer, and there the three houses Nos. 26, 28 and 30, were specifically referred to. It is contended for the tenant that this first notice of application ought to be read as limited to s. 6 of the earlier Act, and not as applying to a " multiple lease " within s. 15, as amended by the Act of 1941 ; that, although this lease was a multiple lease as defined by the earlier Act, the language of the application is more appropriate to a claim of " unfitness " only under s. 6, which does not concern multiple leases and,

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therefore, that this multiple lease ought not to be treated as having been covered by the terms of the first notice of application. My answer to that is that under s. 15, as amended by the later Act, the question of unfitness is dealt with just as plainly as under s. 6 of the Act. Sub-section 6 of s. 15, makes that quite clear: "Unless an application is made to the court under this section with respect to a notice of disclaimer, a notice of retention or a notice to elect served with respect to a multiple lease, the land comprised in the lease shall be deemed for the purpose of any proceedings pursuant to the notice to have been unfit by reason of war damage at the time when the notice was served." That, it seems to me, is conclusive that the first notice did cover this multiple lease, and, subject to one single point, was a good notice.

For these reasons, in my view, the first notice of application was sufficient; but, before I leave that aspect of the case, I will deal with the argument of Mr. Leon, based upon the procedural rules of the County Courts Act in regard to pleadings. It is said by him, and I think justly, that the application to the court by the landlord was an application falling within those rules—to be treated almost like a statement of claim in an action. His point was that there was no application before the learned county court judge, as the rules require, for leave to amend the first notice of application, and that, therefore, the second application cannot be looked at. My answer is that I am prepared to assume that the second application should be wholly disregarded, but that that does not affect my view that the first one was by itself adequate. I do not, myself, propose to consider the second application any further. The appeal must be allowed with costs.

BUCKNILL L.J. I agree. Unfortunately, this court has not the advantage of knowing the reasons why the learned judge came to the conclusion at which he arrived. All he says in his judgment is: "It is clear that the original application must fail." It does not seem to me to be a self-evident proposition and the only implied reason that I can see in his judgment is this; he says in an earlier part of it: "This application was in accordance with the procedure laid down in s. 6 of the Landlord and Tenant (War Damage) Act, 1939 (as amended by the Act of 1941). It is, however, common ground between the parties that the lease in question relates to several properties, and that it is a 'multiple lease' as

"defined by the Act, to which the procedure prescribed by "s. 15 applies." I think that the vital question in the case is whether the first application filed by the landlords was sufficiently in accordance with the provisions of s. 15 to comply with the procedure laid down by the Act. Mr. Leon said we must treat this application as a pleading, and I do not think it would have been a good pleading if the landlords had said something like this: "We apply to the court to determine the question whether the tenant in this case should be allowed to exercise the right of disclaimer or retention." That would be, I think, a bad pleading, because it would not be setting out what is the real issue between the parties. The right of disclaimer by the tenant is based on his allegation that the land is unfit by reason of war damage. That is the real question to be tried by the learned judge and that issue is directly raised in the written application by the landlords in March, 1946. Mr. Leon has referred us to the procedure laid down in the County Court Rules, Or. 6, part II., r. 4 (2a) of which says this: "The following provisions shall apply to an originating application"—this was an originating application—"An originating application shall be in writing"—this was in writing—"shall state the order applied for"—this did state the order applied for—"and sufficient particulars to show the grounds on which the applicant claims to be entitled to the order." I think it sets out quite clearly those grounds. Then: "The names and addresses of the persons intended to be served"—they also were supplied.

In *Price v. Mann* (1), a somewhat similar point to this was raised in the Court of Appeal, when the Master of the Rolls said this: "Reading this document as a whole, it seems to me perfectly manifest that a person who received it, and who had that familiarity with the provisions of the Act which a recipient of such a document must be presumed to have, could not possibly be under any illusion as to what it was intended to be and what its legal consequences were."

I think, for these reasons, that this appeal should be allowed.

SOMERVELL L.J. I agree. Although we are differing from the learned county court judge, the reasons which have led me to consider that this appeal should be allowed have already been

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Solicitors for landlords: *Goodman, Brown & Warren.*
Solicitor for tenants: *G. P. Voss.*

Appeal allowed.

A. W. G.

Distinguished. LITTLECHILD v. HOLT.
[1949] 1 All E.R. 988.

Distinguished. LITTLE-
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[1950] 1 K. B. 1

C. A. FOWLE AND WIFE v. BELL AND WIFE.

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Nov. 13.

Scott,
Bucknill and
Somervell L.JJ.

Landlord and tenant—Rent restriction—Occupied house purchased after prescribed statutory date—House vacated by tenant—Subsequent letting to new tenant—Claim for possession—“Landlord who has become landlord by purchasing the dwelling-house”—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32), sch. I. (h).

The purchaser of an occupied house after the statutory date specified in para. (h) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, who, on the house becoming vacant, lets it to a new tenant is not, in regard to such a tenant “a landlord who has become landlord by purchasing the dwelling-house,” within the meaning of para. (h) and is, therefore, not excepted from its provisions enabling a landlord to recover possession of a dwelling-house if he reasonably requires it for occupation as a residence for himself.

APPEAL from Portsmouth county court.

On August 13, 1941, a date subsequent to the statutory date specified in para. (h) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, as amended by the Increase of Rent and Mortgage (Restrictions) Act, 1938, sch. II. (1), the plaintiffs jointly bought a house,

(1) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sch. I. as amended by the Act of 1938: “A court shall for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation

“ (where the court considers it reasonable so to do) if . . . (h) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after December 6, 1937) for occupation as a residence (i.) for himself; . . . Provided that an order or judgment shall not be made or given on any

No. 114, White Hart Lane, Portchester, which was then in the occupation of a tenant. In July, 1944, the tenant left and, after the house had remained unoccupied for a time, it was let by the plaintiffs to the defendants, W. H. Bell and his wife, on a weekly tenancy. Subsequently the plaintiffs desired to occupy the house themselves and on March 12, 1946, they gave a notice to quit to the defendants which expired on March 25. The defendants refused to leave and the plaintiffs thereupon took proceedings for possession in the county court under s. 3 and para (h) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 on the ground that the dwelling-house was reasonably required by the landlords as a residence for themselves. It was contended for the defendants in the county court that the plaintiffs were disqualified from obtaining possession under para. (h) since they were in the position of a landlord who has "become landlord by purchasing the dwelling-house after the prescribed statutory date." The county court judge was of opinion that the other conditions of para. (h) were satisfied in the case of the plaintiffs but considered that he was compelled by the reasoning of the court of appeal in *Epps v. Rothnie* (1) to hold that they fell within the exception contained in para. (h) and were, therefore, not entitled to possession.

The plaintiffs appealed.

Blundell for the plaintiffs. The county court judge was wrong in holding that the plaintiffs were not entitled to possession under para. (h). The question is whether "landlord" in the parenthesis creating the exception, means landlord in relation to the present tenant. In *Epps v. Rothnie* (1) which, (contrary to the view taken by the county court judge) is in favour of the plaintiffs, it was held that the purchaser of an unoccupied house after the prescribed date, who subsequently let it to a tenant was not, in regard to that tenant, a landlord who had become landlord by purchasing the dwelling-house within the meaning of para. (h) and it is submitted that there is no distinction between purchasing an empty house and letting "ground specified in para. (h) of the foregoing provisions of this schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for

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"the landlord or the tenant"
"greater hardship would be caused
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(1) [1945] K. B. 562.

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it, and purchasing an occupied house and, after it has become, vacant, letting it to a new tenant. In *Epps v. Rothnie* (1) Scott L.J. said "He" [the county court judge] "took the view "with which I agree, that the object of the exception in para. " (h) is to protect a sitting tenant from having his house "bought over his head." The present case is not one of a landlord who has purchased a dwelling-house over the head of a sitting tenant and therefore does not fall within the exception. The words "has become landlord" should be construed as referring to a person who has become landlord in relation to the tenant concerned in the issue before the court. A man may become a landlord by purchasing property already let or by purchasing property and subsequently letting it of his own volition. "Has become" should be construed as referring to something which, although past, is also related to the present. The word landlord is not defined in the Act of 1933 and the definition in s. 12 of the Act of 1920 does not affect the question before the court in the present case. [He referred to *Lloyd v. Cook* (2) and *Read v. Gordon* (3).]

Heathcote-Williams for the defendants. The decision of the county court judge was right. The definition of landlord in s. 12 of the Act of 1920 is material to the question to be decided because it shows that under the scheme of the Rent Restriction Acts, it is possible to have a landlord in relation to a dwelling-house without there being a tenant. In s. 12 landlord is defined to include any person from time to time deriving title from the original landlord and also, in relation to any dwelling-house, any person, other than the tenant who is or would, but for that Act, be entitled to possession of the dwelling-house. That definition must apply to "landlord" in para. (h) of the first schedule to the Act of 1933, since by s. 17, sub-s. 1, of that Act paras. (g) and (h) of sch. I. to the Act of 1933 are incorporated in the 1920 Act. It is not correct to say that the words in parenthesis in para. (h) were inserted only in order to protect a sitting tenant since the whole scheme of the Acts indicates that in them the word landlord is not confined to the common law meaning of the word which involves the existence of a tenant in relation to a landlord. [See *Lloyd v. Cook* (2); *Epps v. Rothnie* (1) is distinguishable from the present case because there the plaintiff bought an empty house whereas in the present case at the time when the plaintiffs bought the

(1) [1945] K. B. 562.

(3) [1941] 1 K. B. 495.

(2) [1929] 1 K. B. 103.

house in question there was in fact a tenant in occupation.]
[He also referred to *Sharpe v. Nicholls* (1).]

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SCOTT L. J., after stating the facts and reading the provisions of para. (h) of sch. I., continued: The question in the case is as to the construction of the words in brackets in para. (h) the issue of interpretation being whether the bracketed words ought to be construed in relation to the tenant before the court, or whether, disregarding that tenant, we should interpret the word "landlord" as if it meant almost the same thing as the word "owner," making the provision read thus: "not being an "owner who has become owner by purchasing the dwelling-house or any interest therein after" the named date. I put it in that bald way because I think that is the real antithesis of interpretation. The county court judge said: "I should "like, if I could, to construe the exception in a manner which "would not apply to the plaintiffs. If it applies, it would only "do so by an accident, and it is not, in my view, the sort of "case which was intended to be excluded by the section. It is "not the case of a person buying a house and trying to eject the "sitting tenant." He then further considered the matter, and came to the conclusion that he was compelled to decide against the landlord for whom he would have liked to make an order, the other conditions of the schedule being satisfied, but he felt prevented from so doing by the decision of this court in *Epps v. Rothnie* (2).

The contention of the tenant below, and in this court as stated by Mr. Heathcote-Williams, has been that the bracketed exception should be read as saying that if, when the plaintiffs originally became the owners of the house, there happened to be a tenant in occupation, that accidental fact excludes the court's jurisdiction; and, if that is right, the appellant is prevented from asking for possession and enjoying the benefit of the paragraph by reason merely of that fact of past history. I do not so read it. The whole of the rent restriction legislation is concerned primarily with the relationship of the landlord to the sitting tenant. The county court judge is made the arbiter between them about that relationship and about the administration of the statutory control over it. It is the present relationship as it is disclosed to the judge at the time of the hearing that matters. The Acts are not concerned, except in a secondary and limited way, with past history. The chief

(1) [1945] K. B. 382.

(2) [1945] K. B. 562.

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exception is to be found in the provisions present in all the Acts from 1915 inwards, that if the house is not a tenanted house let at a rent at the time of the Royal Assent, then the court is required to look back in history and take, as the rent of the house which is to be the standard rent, the last rent that was paid before the Act was passed. At the date of the Act of 1915, no doubt Parliament was influenced by the fact that the war was then on, and, for that reason, took as the date to be made the determining date August 3, 1914. That method of legislation was no doubt adopted because the legislature was looking for some sort of rough criterion of market value, and assumed that, at a time when the parties were presumably able to negotiate freely in the market, what they fixed as the rent was a fair rental value for the house. That is the most important respect in which those Acts ask the court to turn from the present relationship of the parties to a matter of past history.

In considering the bracketed exception to para. (h), we must bear in mind that it is found in an enabling provision which confers jurisdiction on the judge to order possession to be given to the landlord; and, therefore, if there be ambiguity in the exception, it ought to be construed in favour of the landlord and not against him. The phraseology seems to me necessarily to mean this, "not being a landlord who in relation to the tenant "before the court has become that tenant's landlord by purchasing the dwelling-house or any interest therein after" the given date "for occupation as a residence." The exception so read would still achieve what I cannot help thinking was the object of the exception within the brackets, namely, to prevent an outsider first buying a house occupied by a tenant, then giving the tenant notice to quit, and finally coming to the court for an order to get rid of the tenant. If, as was not the case here, the person who became owner by buying the house had thereby become landlord to the tenant from whom possession was asked of the court, then it would be perfectly reasonable, and I think would carry out the object of Parliament, if the paragraph should make it impossible for such an owner to have the benefit of the Act without proof of suitable alternative accommodation. I can see no reason why Parliament should have made any difference between the case where a landlord buys a house empty and untenanted, and subsequently lets it, and then has the benefit of this paragraph, and the case where he buys a house with a tenant in it, and the tenant leaves

after some years, the house becomes empty, and he then gets another tenant. I see no rhyme nor reason in any such legislation, and it seems to me to be inconsistent with the general purpose of the Act so to construe the bracketed words.

I cannot understand the view taken by the learned judge that the case of *Epps v. Rothnie* (1) compelled him to reach a decision with which he obviously disagreed. I do not think that case is strictly relevant, but, if it is, it is in favour of the plaintiffs here, and against the defendants and the view taken by the judge. In that case this court had to consider the case of the purchaser of an unoccupied house after the statutory date referred to in the paragraph, who subsequently let it to a tenant. This court held that the bracketed words did not exclude the landlord from the benefit of the paragraph. I gave the first judgment of the court, and said: "Accordingly, the county court judge held, and in my view, held rightly, that the plaintiff did not become landlord by purchasing the dwelling-house. He took the view, with which I agree, that the object of the exception in para. (h) is to protect a sitting tenant from having his house bought over his head, and that it has no application to a case where the owner of a house purchases it after the statutory date at a time when the house is actually empty, and thereafter lets it to a tenant. In my opinion the county court judge's decision was right on this point." MacKinnon L.J., after citing the paragraph, said this: "Manifestly, a landlord who had a tenant could not be in possession of the house and that mere fact shows that the word 'landlord' in that sub-section does not mean one of the two parties to a contract of tenancy—that would be ridiculous—but the owner of a house who is in a position to become a party to such a contract. The considerations applicable to the meaning of the word 'landlord' in that sub-section are obviously entirely different from those which govern the meaning of the simple words 'a landlord who has become landlord by purchasing the dwelling-house,' which we have to construe." That was a reference to another section altogether with which I need not trouble for the purpose of this judgment. I cite that case only for the purpose of showing that it gives no support to the defendants' argument here. The appeal must be allowed.

BUCKNILL L.J. I agree, but, as we are differing from the

(1) [1945] K. B. 562, 564.

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county court judge, I will add a very few words of my own. The point which the court has to deal with is the interpretation of para. (h) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. It seems to me that the material words of that para. (h) are these: "not being a land-lord who has become landlord by purchasing the dwelling-house." I think there are two possible interpretations of these words: one is "not being a landlord who has become 'landlord of the dwelling-house'"; and the other "not being a 'landlord who has become landlord of the present tenant by purchasing the dwelling-house.'" I feel the more comforted in being a party to reversing the judge in that he himself appears to lean towards the second interpretation. But he says this: "The words might also be read as meaning 'has 'become the landlord,' meaning the landlord of the present tenant"—and then he goes on to say "and this would, I think satisfy the apparent object of the exception, but, having regard to the reasoning adopted by the Court of Appeal in *Epps v. Rothnie* (1), I do not feel justified in construing 'the exception in that way which involves reading into the 'exception the words 'of the present tenant'.'" With the greatest respect to the county court judge, I am unable to agree with his interpretation of the case. The decision, so far as it goes, seems to me to support the reading which the judge himself favoured, and which I also favour.

There is only one other point to which I want to refer, and that is this: In *Epps v. Rothnie* (1) MacKinnon L.J., in dealing with these very words, said this: "If the construction for 'which counsel for the defendant contends is correct, it is 'inconceivable that the legislature would have wasted ink and 'paper by inserting the unnecessary words 'who has become 'landlord by purchasing the dwelling-house' since it would 'have been sufficient simply to have said 'not being a landlord 'who has purchased a dwelling-house'.'" That seems to me a very cogent criticism.

For these reasons, I think that this appeal should be allowed.

SOMERVELL L.J. I agree. There was some discussion in the course of the argument as to the meaning of the word "land-lord" in the Rent Restriction Acts, and we were referred to some authorities dealing with that point. I do not myself think that these authorities, or expressions of opinion, are really

relevant to the question that we are considering here, although I am rather inclined to agree with the observation of Sankey L.J. in *Lloyd v. Cook* (1) where he said : " I am forced to the " conclusion that the meaning of the word must to some extent " be governed by the context in which it is used and the circum- " stances under consideration."

The present case, to my mind, turns on the construction of the whole of sub-para. (h) of sch. I. to the Act of 1933, with, of course, special reference to the words in brackets. The question is : does the exclusion of the landlord referred to in the brackets cover all landlords who bought their interests after the date in question irrespective of whether the tenant sought to be evicted was the sitting tenant at the time of the purchase, or became tenant by a subsequent tenancy agreement ; or does it cover only those who became landlord, as a result of the purchase, of the tenant whom it is sought to evict : in other words, is it restricted to cases in which the tenant sought to be evicted was the sitting tenant at the time of the purchase ? In one sense the landlord in the present case became landlord because he had bought the house after the relevant date. If he had not bought the house in 1941, he could not have let it to the defendants in 1944. Are the words then used in the wider sense of the two senses which I have mentioned ?

We were referred to the case of *Eppe v. Rothnie* (2), by which we are bound, and the reasoning of which, I think, negatives what I call the wider construction of the words. In the course of his judgment Scott L.J. expressed the view that the object of the exception in para. (h) is to protect a sitting tenant from having his house bought over his head. Admittedly, on the facts of the present case, the defendants were not the sitting tenants, and did not have the house bought over their heads. If the object of the paragraph is to protect the sitting tenant, it would be doing something other than its object if it could be successfully relied on in the present case. I think that the construction placed on these words in *Eppe v. Rothnie* (2) covers the argument in this case, although there is this difference in the facts of the two cases, namely, that in that case when the house was bought it was vacant, and in the present case there was a tenant other than the present defendants. For my part, I think the only possibly constructions are the two which I have stated. *Eppe v. Rothnie* (2) negatives the wider one, and I cannot myself see how the words can be given a construction

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(1) [1929] 1 K. B. 103.

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C. A. consistent with *Epps v. Rothnie* (1) which would make the exclusion apply to the present facts. Of course, we have to interpret the words as they appear in the Act, but it is satisfactory, at any rate to my mind, to feel that the interpretation I have placed on them, seems to accord with common sense. I cannot see any reason why, when the house has become empty, after the purchase, so that the landlord could at that moment, if he liked, go into it, the question of when he purchased it should have any relevance to his rights. If he chooses to let it again to another tenant (which may be a thing he ought to be encouraged to do) then I do not think he ought to be in any different position from anybody else because the purchase may be after the date referred to in the Act. For these reasons, I think the appeal should be allowed.

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Appeal allowed.

Solicitors for the plaintiffs: *Kingsford, Dorman & Co., for Blake, Laphorn, Roberts & Rea, Portsmouth.*

Solicitors for the defendants: *Amphlett & Co., for R. V. Stokes & Metcalfe, Portsmouth.*

P. B. D.

(1) [1945] K. B. 562.

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Emergency legislation—War injury—Compensation—Unexploded bomb dropped by enemy aircraft—Bomb taken home by boy—Bomb removed to public thoroughfare—Bomb tampered with by boy—Explosion of bomb—Girl in thoroughfare injured—Novus actus interveniens—Personal Injuries (Emergency Provisions) Act, 1939 (2 & 3 Geo. 6, c. 82), ss. 1, 8.—Scheme made under Act.

In considering whether a physical injury caused by the explosion of a bomb dropped by an enemy aircraft is a war injury within the Personal Injuries (Emergency Provisions) Act, 1939, if the discharge of the missile or other event may be properly said to be a cause of the injury, that is sufficient to entitle the claimant to an award of compensation notwithstanding that there may be other causes co-operating to produce it. It is not necessary that the discharge of the missile or other event should be the sole cause or the effective or predominant cause of the injury, it is sufficient if the discharge of the missile or other event is properly speaking a cause of the injury. Where there is a cause intervening between the discharge of the missile or other event and the injury, it is still a war injury unless the discharge of the missile is so remote as not to be a cause at all.

Where therefore an unexploded bomb was dropped by an enemy aircraft and was taken home by a boy and subsequently taken to a public thoroughfare by the boy and tampered with by him with the result that it exploded and injured a girl who was in the public thoroughfare her injuries were caused by the dropping of the bomb and the boy's interference with it was not such an intervening cause as to supersede it. The girl's injuries were therefore war injuries and entitled her to an award to compensation.

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An enemy aircraft in the early hours of February 23, 1944, dropped explosive incendiary bombs on Chertsey. One of these bombs which had not exploded was picked up by a boy two days later and taken home by him. This boy and another boy on the evening of March 1 took the bomb to a public thoroughfare and tampered with it with the result that it ignited and exploded. The claimant, Ethel May Chennell, a schoolgirl twelve years of age, who was in the thoroughfare at the time, was injured by the explosion and had a finger blown off. A claim was made on behalf of the girl that her injury was a war injury within the Personal Injuries (Emergency Provisions) Act, 1939 (1), and the scheme made thereunder and gave her a claim to compensation. The claim was rejected by the Minister of Pensions, but on appeal to a War Pensions Appeal Tribunal the Tribunal found that it was a war injury and entitled her to compensation.

The Minister appealed.

Stephen Chapman for the Minister. The claimant's injuries were not the direct result of the enemy action inasmuch as there was a *novus actus interveniens* which caused a break in the chain of causation between the enemy action and the claimant's injuries, the act of the boy who was a school boy twelve years of age and who must therefore be presumed to know the consequences of what he was doing, in removing the bomb from the

(1) Personal Injuries (Emergency Provisions) Act, 1939, s. 1, sub-s. 1: The Minister may make a scheme . . . providing for the making of payments in respect of the following injuries . . .
(a) war injuries sustained by gainfully occupied person . . . s. 8. "War injuries" means physical

injuries—(a) caused by—(i.) the discharge of any missile . . . or (ii.) the use of any weapon, explosive or other noxious thing or (iii.) the doing of any other injurious act; either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy.

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place where it had fallen amounting to a novus actus interveniens, and further the act of the two boys in subsequently taking the bomb to a public thoroughfare and tampering with it and so causing it to explode was also a novus actus interveniens, and consequently the claimant was not entitled to an award for compensation.

Crispin for the claimant. The claimant's injuries were the direct result of the enemy action and were therefore war injuries in respect of which the claimant was entitled to an award to compensation. There had been no novus actus interveniens. The act of the boy in removing the bomb from the place where it had been dropped and subsequently tampering with it so as to cause it to explode did not constitute a novus actus interveniens because it was the act of one who did not know or realize the consequence of what he was doing or that his act was wrongful, and might cause injury to some person.

Cur. adv. vult.

Nov. 28. DENNING J. read the following judgment. The question in the case is whether the physical injury was "caused by" the discharge of the bomb by the enemy. It involves a consideration of the problem of causation, a problem which continually occurs in all branches of the law. I have had occasion to consider it under the Royal Warrant for Pensions when the question is whether an injury or disease is "attributable to" war service. It has occurred in insurance cases when the question is whether the loss is a "consequence of" warlike operations. It has arisen in cases on the remoteness of damage. The subject has been variously treated in the various branches of the law. I have the responsibility of deciding it finally in pensions cases, and the principles which I am about to lay down are applicable both under the Personal Injuries Scheme and the Royal Warrant.

Much depends on the right approach. The best way is to start with the injury and inquire what are the causes of it. Sometimes there may be a single cause. More often there is a combination of causes. If the discharge of a missile or other event may be properly said to be a cause of the injury, that is sufficient to entitle the claimant to an award of a pension, notwithstanding that there may be other causes co-operating to produce it, whether they be antecedent, concurrent or intervening. It is not necessary that the discharge of the missile or other event should be "the" cause of the injury in the sense

either of the sole cause or of the effective and predominant cause. In many cases where there is a combination of causes, it is impossible to single out one cause as distinct from others, and any attempt to achieve that impossible task would lead to difficulties as the insurance cases amply show. All that is necessary is that the discharge of the missile should be properly speaking "a" cause of the injury, just as in claims for breach of contract to provide a seaworthy ship, all that is necessary is that the unseaworthiness should be a cause of the damage, *Smith Hogg & Co. v. Black Sea & Baltic General Insurance Co.* (1), or in cases of one damage caused by two separate torts, each tortfeasor is liable for the whole damage, as in *North Western Utilities, Ltd. v. London Guarantee & Accident Co.* (2).

Another way of approach is to start with the discharge of the missile or other event and ask what are the consequences of it, but some care is required in this approach lest one is confused by analogies with cases of breaches of contract or of negligence, when it is not as a rule sufficient simply for the damage or injury to be caused by the wrongful act. The defendant in such cases is not necessarily responsible for all consequences, that is, for all damage or injury of which the wrongful act is the cause, but only for certain consequences. Responsibility primarily depends in those cases on whether the damage or injury is of such a kind (irrespective of its degree or extent) as the defendant might reasonably be expected to be able to foresee. Foreseeability is as a rule vital in cases of contract; and also in cases of negligence, whether it be foreseeability in respect of the person injured as in *Palsgraf v. Long Island Ry.* (3) (discussed by Professor Goodhart in his Essays, p. 129), *Donoghue v. Stevenson* (4), and *Bourhill v. Young* (5), or in respect of intervening causes as in *Aldham v. United Dairies (London) Ltd.* (6), and *Woods v. Duncan* (7). It is doubtful whether *In re Polemis and Furness Withy & Co.* (8) can survive these decisions. If it does it is only in respect of neglect of duty to the plaintiff which is the immediate or precipitating cause of damage of an unforeseeable kind. In pension cases, however, foreseeability is irrelevant. It does not matter what the enemy who discharged the missile might reasonably have expected to occur or what the War Department (who accepted the man for

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(1) [1940] A. C. 997, 1004-8.

(2) [1936] A. C. 108, 126-8.

(3) (1928) 248 N. Y. 339.

(4) [1932] A. C. 562.

(5) [1943] A. C. 92.

(6) [1940] 1 K. B. 507.

(7) [1946] A. C. 401, 421, 442.

(8) [1921] 3 K. B. 560.

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service) might reasonably have expected to happen. The award of a pension depends on causation and causation alone. Once the test of foreseeability is rejected, the test of causation is to be found by recognizing that causes are different from the circumstances in or on which they operate. The line between the two depends on the facts of each case. I will give some illustrations.

One : When the discharge of the missile or other event is the immediate or precipitating cause of the injury, it is a "war injury" notwithstanding that there was some other antecedent or concurrent cause also operating. For instance, if a man refused to obey orders to take shelter on an air-raid warning, and was in consequence hit by a bomb, his own conduct would be a cause of his injury but the impact of the bomb was also a cause and the injury would be a "war injury." So also in cases under the Royal Warrant when a man sustains a hernia by reason of an accident on service, which was not of such severity as to have caused the hernia, had there not been an inherent weakness predisposing him to rupture, the accident in service is the immediate or precipitating cause, the inherent weakness is the antecedent or concurrent cause, but nevertheless the proper finding is that the rupture is "attributable to" war service (*Richards v. Minister of Pensions* (1)). A parallel exists in cases of tort (*In re Polemis* (2)).

Two : Where there is a cause intervening between the discharge of the missile and the injury, it is still a "war injury" unless the discharge of the missile is so remote as not to be a cause at all. For instance if an unexploded bomb is taken up by a bomb disposal squad and explodes as it is being taken away along an uneven road, the injuries to the members of the squad and bystanders are all caused by the dropping of the bomb notwithstanding the intervening cause. A parallel exists in tort, *Haynes v. Harwood* (3), *The Oropesa* (4). If the bomb is removed to a remote place and there exploded, and the noise of the explosion frightens a horse some miles away and the horse treads on the carter's toe, the injury is a "war injury" because the original dropping of the bomb by the enemy was a cause of the injury, notwithstanding the numerous intervening causes and notwithstanding that the injury was one which could not reasonably be foreseen. So also if a house is damaged

(1) (1946) Reports of War Pensions Appeals 155.

(2) [1921] 3 K. B. 560.

(3) [1935] 1 K. B. 146.

(4) [1943] P. 32.

by the blast of a bomb, and a workman engaged on the repair of it is injured by the collapse of a floor, the injury is "caused by" the impact of the bomb, notwithstanding the intervening action of the workman in walking on the dangerous floor and his voluntary acceptance of the risk involved in it (*Taylor v. Sims and Sims* (1).)

Three: Even if the intervening cause is the negligence or wrongful act of the injured person or a third party, the injury may be still a "war injury." For instance if a bomb explodes as it is being taken away, either by miscalculation or error of judgment of the bomb disposal squad, or by their negligence or the negligence of some other user of the highway, the injuries sustained by members of the squad or by bystanders are all caused by the original dropping of the bomb as well as by the other intervening cause. If a boy trespasses on war department land and is injured by a minefield, the injury is still caused by the use of an explosive in combating the enemy, as well as by the other intervening wrongful act of the boy: (*Adams v. Naylor* (2)). A parallel exists in cases of unseaworthiness (*Smith Hogg & Co. v. Black Sea & Baltic General Insurance Co.* (3)) and in tort (*The Margaret* (4)).

Four: When an intervening or extraneous event is so powerful a cause that the dropping of the bomb ceases to be a cause at all but is only part of the circumstances in or on which the cause operates the injury is not a "war injury." For instance if an enemy cannon-shell, after passing through various hands comes into the possession of a workman who out of curiosity saws it at his bench, and it explodes, the "cause" of the injury is the man's own conduct. The original firing of the shell by the enemy is not a cause of the injury but only part of the history. (*Smith v. Davey Paxman & Co.* (5).) So also if a theatre is damaged by the blast of a bomb, and five years later a customer is injured by the fall of a ceiling which is traceable to the damage, the "causes" of the injury are the failure of the proprietor to see that the theatre was safe and his invitation of the public to it in its existing condition. The dropping of the bomb is again not a "cause," but only part of the history (*Pope v. St. Helens Theatre* (6).) That case shows that in a train of physical events the latest event is not necessarily "caused by" the first event. (A parallel exists in cases of tort, *Buckner v. Ashby*

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(1) (1942) 58 T. L. R. 339.

(2) [1946] A. C. 543.

(3) [1940] A. C. 1003-8.

(4) (1881) 6 P. D. 76.

(5) [1943] 1 All E. R. 286.

(6) Ante p. 30.

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& *Horner, Ltd.* (1.) Another instance is when, whilst a soldier is on service, his wife goes off with another man and in consequence the soldier is reduced to a chronic anxiety state. The disease is then attributable not to war service but to the wife's personality and conduct : (*W. v. Minister of Pensions* (2).) It may be that if the soldier had not been separated from his wife by war service, she would not have been unfaithful and he would not have suffered, but that does not mean that the war service is a "cause" of the disease, and that is so, even though on an average wives are more likely to be unfaithful when they are separated from their husbands than when they are not. Persons may be more likely to be involved in an accident in a London street than in a country road, but the cause of an injury in any particular case is not the visit to London but the negligence of some one or other. Instances can be found in cases of tort of an intervening cause (*The San Onofre* (3)). or an extraneous event (*Liesbosch, Dredger v. Edison, S.S. Owners* (4)) being so powerful a cause as to reduce the rest to part of the circumstances in which the cause operates.

The only case which is inconsistent with the principles I have stated is *Greenfield v. London & North Eastern Ry.* (5). In that case the enemy dropped a bomb at ten minutes past nine on a railway line, it made a crater and dislocated communication. A signalman, after telephoning his superior officer directed a train driver to proceed at caution. He did so and at a quarter to ten the engine fell into the crater and the driver was killed. The railway company admitted negligence in directing the driver to proceed and the Court of Appeal held that it was not a "war injury." Their decision seems to proceed on the basis that unless the impact of the bomb was the immediate and precipitating cause of the injury, it could not be a "war injury," or at any rate, that, if the neglect of a third person intervened, that sufficed. They seem to have approached the statute in the same way as the Court of Appeal did in *Adams v. Naylor* (6), namely, that it was not the intention of the legislature to take away the right of the injured party to sue a wrongdoer, that is in *Greenfield's* case, the railway company. Since that time *Adams v. Naylor* has reached the House of Lords (7). Lord Simon has made it clear that that approach of the Court of Appeal to the statute was wrong.

(1) [1941] 1 K. B. 321.

(2) [1946] 2 All E. R. 501.

(3) [1922] P. 243, 253.

(4) [1933] A. C. 449, 461.

(5) [1945] K. B. 89.

(6) [1944] K. B. 750.

(7) [1946] A. C. 543.

He said that that view " fails to take sufficiently into consideration that the primary object of the Act is not to take away rights of compensation but to make provision for compensation under a scheme which would cover large numbers of civilians who would otherwise not be compensated at all."

In *Adams v. Naylor* (1) the House of Lords held that the injury was " caused by " the use of the mine, notwithstanding the intervention of a wrongful act by the person injured. After that decision it cannot be suggested that an intervening wrongful act or a fortiori a negligent act of the injured party or a third party is by itself sufficient to defeat the claim to a pension. It seems to me that *Greenfield's* case (2), although not expressly overruled, cannot stand with the decision in the House of Lords in *Adams v. Naylor* (1), and I am therefore not bound to follow it.

Relieved of *Greenfield's* case (2) and applying the principles that I have stated, I am of opinion that in this case the dropping of the bomb by the enemy was a cause of the injury and that the boys' interference was not so powerful an intervening cause as to supersede it. The injury was therefore " caused by " the dropping of the bomb by the enemy. I hold that the tribunal came to a correct conclusion in point of law and I dismiss the appeal.

Appeal dismissed.

Solicitor for the Minister : *Treasury Solicitor.*

Solicitors for claimant : *Culross & Trelawney.*

(1) [1946] A. C. 543.

(2) [1945] K. B. 89.

R. F. S.

MANKIN AND ANOTHER v. SCALA THEODROME COMPANY LIMITED.

1946

Nov. 4, 5.

Stable J.

Master and servant—Injury to servant—Responsibility of third person—Claim by master against tortfeasor for loss of services of servant—Measure of damages.

A master whose servant suffers injuries for which a third person is responsible in circumstances which would give the servant a right of action against such person, is entitled to claim damages from the latter for the loss of the services of his servant whether the injury to the servant is due to misfeasance or to mere non-feasance on the part of the person responsible.

In such an action the damages recoverable by the master are not

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limited to the value to him of the services of the servant as represented by the amount of wages paid to him, but include any loss directly suffered by the master as the result of the loss of those services.

ACTION tried by Stable J.

The plaintiffs, R. Mankin and J. Cochrane, together constituted a music hall turn known as the Two Pirates, the first plaintiff being employed by the second at a salary of 10*l.* a week and the second plaintiff being paid 40*l.* a week for the turn. On September 23, 1944, the plaintiffs were performing at the Hippodrome Theatre, Bury, Lancashire, of which the defendants were the owners and occupiers, when, owing, as the plaintiffs alleged, to the defective condition of the stage by reason of the existence of a loose board of which the defendants knew or by the exercise of reasonable care might have known, the first plaintiff's left foot went through the flooring of the stage and he severely wrenched his knee. As a result the first plaintiff was unable for some time to perform the more exacting part of the turn and his wages were accordingly reduced from 10*l.* a week to 2*l.* 10*s.* Consequent on the first plaintiff's injuries the amount received by the second plaintiff for the turn was reduced from 40*l.* a week to 30*l.* while the full performance could not be given, and for a time the second plaintiff had to take temporary work at 10*l.* a week. The first plaintiff claimed damages in respect of personal injuries and loss of earnings and the second plaintiff, damages for the loss of the services of his servant.

Evidence having been given :

Barry K.C. and *Armstrong-Jones* for the defendants. The case of the two plaintiffs are quite distinct and no difficulty arises in the case of the first plaintiff if the defendants are held liable. The case of the plaintiff Cochrane is entirely different. He suffered no injury but, assuming that the defendants are liable he has had a certain limited right infringed in that he has lost the services of his servant. Under the old form of action the plea would have been *per quod servitium amisit*. On the authorities the act giving rise to such a claim must be an act of positive negligence as opposed to mere non-feasance as was the case in the present instance. The cases supporting this view are *Taylor v. Manchester, Sheffield & Lincolnshire Ry. Co.* (1) and *Meux v. Great Eastern Ry. Co.* (2)

(1) [1895] 1 Q. B. 134.

(2) [1895] 2 Q. B. 387.

though both were primarily concerned with the question of damage arising under a contract. In the second case, however, all the members of the court of appeal, drew a clear distinction, between an active tort and a mere non-feasance and it is submitted that in order to give a master a right of action for the loss of the services of his servant there must have been active misfeasance on the part of the defendant. If this contention is sound, the second plaintiff would have no right of action against the defendants. Assuming however, that a right of action exists, his claim would be a very limited one, namely, for the loss of his servant's services, whereas in the present case he is claiming the loss of his own earnings. The reason why the courts have not been flooded by actions of this character is because the loss of the servant's services must be measured by the master's assessment of their worth, i.e., the amount of the wages the master pays. Here the second defendant is saying : " Although I am paying my servant 10*l.* a week, what I can " claim is some incalculable sum." There is no justification for such a claim in principle or authority. In *Att.-Gen. v. Valle-Jones* (1) MacKinnon J. said : " where he " (the master) " does " not employ a substitute, if he continues to pay the wages to " the injured servant, he clearly loses any benefit arising from " that payment, because he is getting nothing in return for it. " In that case, therefore, his damages are, *prima facie*, the " amount of the wages he has paid for nothing." The question of the master's earnings cannot be taken into consideration in assessing the damages he has suffered. The principle applicable is in substance covered by the judgment of Lord Wright in *Owners of Dredger Liesbosch v. Owners of Steamship Edison* (2). [They also referred to *Everard v. Hopkins* (3), *Hall v. Hollander* (4), *Martinez v. Gerber* (5) and *Hodsoll v. Stallibrass and another* (6).]

Beecroft for the plaintiffs. The plaintiff Cochrane is entitled to maintain an action for the loss of his servant's services irrespective of the nature of the tort by which the servant was injured. It matters not a jot whether the tort was one of active negligence or of mere omission. In *Salmond on the Law of Torts*, 9th ed., p. 386, the law is stated thus : " It is a tort " actionable at the suit of a master to take away, imprison or " cause bodily harm to his servant if (a) the act is a tort as

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- (1) [1935] 2 K. B. 209, 216, 217. (4) (1825) 4 B. & C. 660.
(2) [1933] A. C. 449, 459. (5) (1841) 3 Man. & G. 88.
(3) (1615) 2 Bulstrode 332 ; (6) (1840) 11 A. & E. 301.
1 Rolles Rep. 124.

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“ against the servant and, (b) the master is thereby deprived of “ his servant’s services.” In that passage, which it is submitted accurately states the law, no distinction is made as to the nature of the tort committed on the servant, and it is apparent from *Martinez v. Gerber* (1), which was fought on that very point, that no such distinction should be made. With regard to the damages to which the second plaintiff is entitled it is clear from *The Owners of the S.S. Gracie v. The Owners of the S.S. Argentino* (2) that future contingencies may be taken into account in assessing damages, and in the present case the loss to the music-hall act as a whole resulting from the injury to the first plaintiff is recoverable by the second plaintiff. *Bradford Corporation and Another v. Webster* (3) shows that the measure of damages recoverable by the master in such a case as the present is not confined to the value of the servants’ services but extends to any loss directly sustained by the master as the direct result of being deprived of those services.

STABLE J. stated the facts and said that he had come to the conclusion that the defendants had failed to exercise reasonable skill and care in the matter of the provision of a proper stage and that they were accordingly responsible for the accident to the first plaintiff to whom he awarded 70*l.* damages in respect of his personal injuries and loss of earnings.

Dealing with the case of the second plaintiff, his Lordship continued : Mr. Cochrane’s cause of action is entirely different from that of the first plaintiff ; he was not hurt ; he did not put his foot through the hole, but he claims that by reason of the negligence of the defendants he lost the services of Mr. Mankin and has sustained damage. This claim gives rise to interesting questions. It was said on behalf of the defendants that this peculiar form of action by a master for the loss of his servant’s services, which seems to have started from the natural desire of courts to inflict some sort of penalty on persons who seduce young people, has gradually developed. The earlier cases as I have said, were cases of seduction, and by an obvious and logical stage the principle was applied to cases where the wrong done to a servant, whereby the master lost his services, was regarded as being something in the nature of a trespass to the person. It appears, however, from the very ancient case of *Everard v.*

(1) 3 Man. & G. 88.

(2) (1889) 14 App. Cas. 519.

(3) [1920] 2 K. B. 135.

Hopkins (1) that in those days at all events it was not every tort resulting in a master losing the services of his servant which gave rise to a cause of action by the master. It is extremely difficult, however, to see where, and on what principle, the line is to be drawn. I was referred to a number of cases during the argument. In one of these, *Meux v. Great Eastern Ry. Co.* (2) in which the Court of Appeal held that the defendants were liable to compensate the claimant, each of the lords justices laid emphasis on the fact that the tort was an act not of omission but of commission. Lord Esher M.R., said "If they" (the defendants) "authorize" their servants to take luggage up and carry it, the servants "must do so with reasonable care, and for any active wrongful" "act on their part the company are liable." Then later on in discussing the decision of Bramwell B. in *Hayn v. Culliford* (3), Lord Esher said: "He" (Bramwell B.) "was dealing, not with" "an omission to do something, or with mere nonfeasance, but" "with misfeasance and he pronounces such a misfeasance to" "be an act wrongful in itself." Kay L.J. said: "It is quite" "plain that there was an act, not of omission but of com-" "mission, which was negligent and improper, and which caused" "the destruction of these things." Smith L.J. said: "She" (the plaintiff), "has incurred loss by reason of her property having" "been destroyed by the active negligence of the servants of the" "company while it was lawfully on the premises of the com-" "pany, she has therefore a right of action in tort wholly irres-" "pective of contract. Her goods were lawfully on the defen-" "dants' premises and by their active negligence" (I lay stress on the word "active"), "those goods have been damaged."

If it be the law that when a person in the position of a servant is injured by the act or omission of someone else, so that his master is deprived of his services, a right of action is given to the master in respect of that act or omission, it seems remarkable that the courts have not been inundated with actions of that kind during the years that have elapsed. On the other hand, on what principle can one draw the line between those wrongs resulting in loss of service which give a right of action to the master and those which do not? Having regard to the case cited I find myself quite unable to extract from them any principle which provides a satisfactory answer to that question.

(1) 2 Bulstrode, 332; 1 Rolles Rep. 124.

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(3) (1879) 4 C. P. D. 182.

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My view is that the right a master has to the services of his servant is regarded by the law as a species of property in the early days of law, the servant was no doubt, almost a species of property in himself, hardly distinguishable from a chattel—and that where that right of the master is interfered with by any act or omission done to, or suffered by the servant, which if resulting in injury to him would give the servant a right of action against the wrongdoer, it also confers a right of action on the master. I, of course, exclude those cases where the servants' rights are derived from contract and not from a purely tortious act. The result is that in the present case although there was no active wrong inflicted on Mr. Mankin by the defendants, his injuries arose from a defect in the stage which reasonable care and skill would have brought to their knowledge, and notwithstanding that the wrong of the defendants was an omission and not a positive act, Mr. Cochrane is entitled to recover. On the question of the measure of damages, Mr. Barry argued that having regard to the peculiar nature of this form of action, the measure of the master's damages was limited, and must be confined to the actual value of the services which the master has lost and to any extra expense to which the master was put as a definite result of the mischief done. I have come to the conclusion that the quantum of damage is not confined within such narrow limits as those suggested by Mr. Barry, and that in each case one must ascertain what was the direct consequence to the master of the loss of his servant's services. In the present case I think that the proper figure to award Mr. Cochrane is 145*l.* for the loss he sustained as the direct result of being unable to use Mr. Mankin's services in the way in which he would have used them had Mr. Mankin not been injured.

Judgment for plaintiffs.

Solicitors for the plaintiffs : *Randolph & Dean.*

Solicitors for the defendants : *Hair & Co.*

P. B. D.

REX v. CHANCELLOR OF ST. EDMUNDSBURY AND
IPSWICH DIOCESE. *Ex parte* WHITE.

1946
Nov. 6, 7.

*Crown practice—Certiorari—Writ does not lie to ecclesiastical court—
Distinguished from writ of prohibition—Ecclesiastical court not
inferior court—Communis opinio.*

Lord Goddard
C.J.,
Lewis and
Oliver JJ.

Certiorari does not lie from the Court of King's Bench to an ecclesiastical court.

Per Lord Goddard C.J. : It would be sufficient to justify refusal of the writ that there is no precedent for its issue to an ecclesiastical court and that there has been *communis opinio* among lawyers that it does not lie. A writ of certiorari is to be distinguished from a writ of prohibition and it does not follow that because the latter lies to an ecclesiastical court, the former lies also, because ecclesiastical courts are not inferior courts.

MOTION for order of certiorari.

The applicants, the Rev. W. G. White, Vicar of the parish of St. Mary, Haughley, Suffolk, and Mrs. Rosie Helen Bloom, Churchwarden of the same parish, applied for an order of certiorari to quash a faculty which was granted on September 8, 1944, by the Chancellor of the Diocese of St. Edmundsbury and Ipswich authorizing one Mrs. Florence Paddy and members of her family at all times to have access to the grave of her child in the churchyard of the parish church. The grounds on which relief was sought by the applicants were that the faculty was granted without or in excess of jurisdiction. Leave to apply for an order of certiorari was granted by the Divisional Court on June 6, 1946.

On the motion coming on for hearing on November 6, 1946, the respondents raised a preliminary objection that the court had no jurisdiction to issue a writ of certiorari to a consistory court.

Neville Gray K.C. (*Humphrey King* with him) for the respondents. Certiorari does not lie to an ecclesiastical court because certiorari is only directed to an inferior court and an ecclesiastical court is not an inferior court. The ecclesiastical courts and the courts of common law have always existed side by side. An appeal from a consistory court lies to the Court of Arches from which an appeal lies to the Privy Council, which is the highest court on the ecclesiastical side. There is no case of a writ of certiorari ever having been directed to an ecclesiastical court. It is stated in *Halsbury's Laws of England* (2nd ed.),

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vol. 9, para. 1420, that "the writ of certiorari issues out of a superior court, and is directed to the judge or other officer of an inferior court of record." On the other hand "the writ of prohibition is a prerogative writ, issuing out of the High Court of Justice, and directed to an ecclesiastical or inferior temporal court, which forbids such court to continue proceedings therein in excess of its jurisdiction": see para. 1394. "It lies . . . against every ecclesiastical court, even probably against the Privy Council, when sitting as a court of appeal in ecclesiastical matters": see para. 1408. It is stated in Viner's Abridgment (2nd ed.), vol. 4, p. 329, that "if the record be pleaded in a more base court than that in which it is, the court may grant a certiorari." In Jacob's Law Dictionary (7th ed.) certiorari is defined as "a writ issuing out of the Chancery to an inferior court, to call up the records of a cause there depending, that justice may be done therein, upon complaint that the party who seeks the said writ hath received hard usage, or is not like to have an indifferent trial in the said court." It "lies where the King would be certified of a record in any Court of Record." *Ricketts v. Bodenhams* (1) was a case of prohibition to ecclesiastical courts in which the question discussed was whether there was a want of jurisdiction. In the course of the discussion Littledale J., after referring to certain cases which had been cited, said (2): "Those are cases of common law courts, which are inferior to the Courts of Westminster Hall; but ecclesiastical courts are not so." That writs of certiorari are available for the removal of any judicial act or quasi judicial act from only inferior courts is clear from Short and Mellor's Practice of the Crown Office, 2nd ed., pp. 14, 81. Scrutton L.J. in *Rex v. London County Council* said (3): "The writ of certiorari is a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior court." Ecclesiastical courts exercise a jurisdiction distinct from the jurisdiction exercised by the King's courts. Their jurisdiction has been cut down, but

(1) (1836) 4 Ad. & E. 433.

(3) [1931] 2 K. B. 215, 233.

(2) *Ibid.* 446.

they still exist as superior courts. Uthwatt J. dealt with this question in *Att.-Gen. v. Dean and Chapter of Ripon Cathedral* (1) where he pointed out "that there is a body of law which is administered and enforced by ecclesiastical courts alone. Coke draws the distinction in *Caudrey's* case (2) where he says: 'And as in temporal causes, the King, by the mouth of the judges in his Courts of Justice doth judge and determine the same by the temporal laws of England: so in causes ecclesiastical and spiritual, as namely, blasphemy, apostacy from Christianity, heresies, schisms, ordering admissions, institutions of clerks, celebration of divine service, rights of matrimony, divorces. . . . (the consequence whereof belongs not to the common laws of England), the same are to be determined and decided by ecclesiastical judges, according to the King's ecclesiastical laws of this realm.' Many of the topics included in Coke's list have passed out of the jurisdiction of the ecclesiastical courts to the jurisdiction of the temporal courts, but much still remains to the ecclesiastical courts." Uthwatt J. went on to point out that the law was one, but jurisdiction as to its enforcement was divided between the ecclesiastical courts and the temporal courts, and that temporal courts had a certain jurisdiction in relation to the ecclesiastical courts which they could enforce by mandamus and a writ of prohibition, but he did not say that certiorari lay to an ecclesiastical court. Thesiger L.J. pointed out in *Martin v. Mackonochie* (3) that the mode in which a suit in respect of certain offences against ecclesiastical law "is to be conducted, the sentence which it is open to the judge to pronounce, and the means by which that sentence is to be enforced, are all, in the absence of statutory provision relating to these matters, to be regulated by the practice of the court itself, and in respect of which if the judge errs, appeal and not prohibition would be the proper remedy, unless his error involves the doing of something which, in the words of Littledale J. in *Ex parte Smyth* (4), is 'contrary to the general laws of the land,' or, to use the language of Lush J. in the court below, is 'so vicious as to violate some fundamental principle of justice.' "

Neither of those considerations apply in the present case. It is stated in Comyn's Digest, Tit. Prohibition under F. 1:—

"A prohibition shall be granted to the spiritual court in all

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(1) [1945] Ch. 239, 244.

(3) (1879) 4 Q. B. D. 697, 732.

(2) (1591) 5 Co. Rep. 8b xxvii.

(4) (1835) 3 Ad. & E. 719, 724.

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“cases where the ecclesiastical judge proceeds in a manner out of their jurisdiction . . . for it is a sufficient clause for a prohibition that the ecclesiastical court exceeds its jurisdiction.” But there has never been an attempt to grant a writ of certiorari except to an inferior court and an ecclesiastical court is not an inferior court. This motion should therefore be dismissed.

Sutton K.C. and *Stranders* contra. Assuming that the consistory court has made an order which it had no jurisdiction to make, this court can order certiorari to issue to it. An ecclesiastical court is an inferior court. There is no case which says that the Court of King's Bench has no authority over an ecclesiastical court which has made an order without jurisdiction. It is true that there is no case in the books in which certiorari has been granted to an ecclesiastical court, but whether or not a rule for certiorari is granted is in the discretion of the court, and if a rule should be granted it would be within the jurisdiction of the court. It would be going a long way to say that this court will not set aside an order which has been made without jurisdiction. There is no case which says that an ecclesiastical court is an inferior court ; but it is stated in Halsbury's Laws of England (2nd ed.), vol. 8, at para. 1170, in regard to what are superior and inferior courts, as follows : “The superior courts are the House of Lords, the Judicial Committee of the Privy Council, the Supreme Court of Judicature, the Court of Criminal Appeal, and the Courts of Chancery of the Counties Palatine of Lancaster and Durham, and are all courts of record. All other courts are inferior courts, whether they are courts of record or not.” It is admitted that prohibition will lie to an ecclesiastical court and there is no difference in this respect between a writ of prohibition and a writ of certiorari. In effect the rule to-day is that a writ of prohibition will lie to a court when that court has not made an order, and a writ of certiorari will lie to a court which has made an order to prevent that order being acted upon. For example, prohibition will lie to a Palatine Court of Chancery with respect to land outside the county. The fact that mandamus and prohibition will lie to an ecclesiastical court shows that it is an inferior court. In *Rex v. North* (1) a writ of prohibition to a consistory court was granted by the Court of Appeal on the ground that a certain order was made without giving the Vicar an opportunity of being heard in his defence

(1) [1927] 1 K. B. 491.

and therefore made without jurisdiction. A writ of prohibition to a spiritual court was also granted in *Burder v. Veley* (1). In that case Lord Denman C.J. said (2): "a second point was urged, that prohibition ought not to go from this court to the court Christian; the main reason being that the latter has exclusive jurisdiction over the subject matter, which is said to be purely of ecclesiastical cognizance, and that appeal lies from the consistory court to the court of Arches . . . the principle itself, however hard to apply, is clear. It is this: that, if any inferior court will entertain a suit which appears by the libel in the outset, or is shewn on the face of the proceedings, to be beyond its jurisdiction, the courts of Westminster Hall have no discretion to award or refuse the writ, but are bound to award it." That case shows that ecclesiastical courts are inferior courts.

[LORD GODDARD C.J. There is such a thing as communis opinio, which was referred to by Lord Ellenborough in *Isherwood v. Oldknow* (3). It seems to have been accepted by lawyers that certiorari did not lie, for since the twelfth or early thirteenth century such a thing has apparently never been attempted.]

The absence of precedent will not prevent the court from granting certiorari if it has jurisdiction to do so: *Ellerman Lines, Ltd. v. Read* (4). In that case Scrutton L.J., speaking of the jurisdiction of the court to grant an injunction restraining a person from enforcing a foreign judgment, said (5): "If there is no authority for this it is time that we made one."

Even if ecclesiastical courts are not inferior courts, there is no doubt that prohibition lies to them, and if prohibition lies, then there is no reason why certiorari should not lie also. There is no distinction between prohibition and certiorari except that the former may be invoked at an earlier stage. In *Rex v. Electricity Commissioners* (6) in which writs of prohibition and certiorari were sought against the Electricity Commissioners, Atkin L.J. said: "Both writs are of great antiquity, forming part of the process by which the King's courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division to have its

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(1) (1840) 12 Ad. & E. 233.

(4) [1928] 2 K. B. 144.

(2) Ibid. 256.

(5) Ibid. 152.

(3) (1815) 3 M. & S. 382, 396.

(6) [1924] 1 K. B. 171, 204.

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"legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a court of justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be . . . courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs." Therefore unless the respondents satisfy the court that there is no jurisdiction to grant certiorari, the court should hold that they have power to do so.

Gray K.C. replied.

LORD GODDARD C.J. Mr. Gray took the preliminary point that this court could not proceed with this matter because certiorari, he said, does not lie to a consistory court. It would really be sufficient, I think, for this court to say, when it is shown that from the earliest days of the King's courts no writ of certiorari has ever been issued by this court to an ecclesiastical court, that it is far too late now to come and ask this court to make a precedent and order a certiorari to issue. It is true that prohibitions have lain to the ecclesiastical courts, certainly since the twelfth century, and probably earlier, but no trace can be found of a certiorari ever having been granted or even moved. Lord Ellenborough C.J. in *Isherwood v. Oldknow* (1) said that communis opinio is evidence of what the law is, and it seems abundantly clear that there has been a communis opinio among lawyers that certiorari does not lie to an ecclesiastical court, because in the scores—I might say hundreds—of cases which have come before the King's courts in the old days, and afterwards before this court, in which an excess of jurisdiction has been alleged against a spiritual court, there is no trace that counsel have ever attempted to obtain more than a writ of prohibition, or have ever suggested that certiorari be granted.

A writ of prohibition prohibits the court from entertaining an action or, in proper cases, from proceeding upon the judgment or other matter in the court. Certiorari is a writ by

(1) 3 M. & S. 382, 396.

which the record of the court is brought up to be examined in this court. It may be an attractive argument to say that if prohibition lies, certiorari must lie, because in both cases the result is exactly the same. The court only issues either writ if satisfied that there is an excess of jurisdiction, and, therefore, if it can issue a writ to a spiritual court prohibiting it from entertaining a case on the ground that it is outside its jurisdiction, it must necessarily follow, so it is submitted, that the court can issue a writ of certiorari, notwithstanding that no prohibition has been moved, and examine the record to see whether it was beyond the jurisdiction and, if it was, to quash it.

As I have said, it would, in my opinion, be enough in this case to say that this court is not prepared in the twentieth century to make a precedent for a course of action which, if it were open to the applicant now, must have been open before. The unbroken and universal practice shows that it has never been considered that certiorari lies to a spiritual court. I think it is useful to ascertain, if possible, the principle which underlies the reason for saying that although prohibition may lie, certiorari will not. I think it is to be found very largely in the proposition that certiorari will only lie to an inferior court. The question arises, therefore, whether the courts Christian or spiritual courts are inferior courts in the true sense of the word "inferior," that is, inferior to this court; and it no doubt is an attractive argument to say that they must be inferior to this court or this court would not grant a prohibition against them.

There are certainly dicta by very learned persons to be found which seem to show that spiritual courts are not inferior courts in the sense that this court can treat them as such for the purpose of examining their records. Littledale J., a lawyer of very great learning and eminence, in *Ricketts v. Bodenham and Others* (1), distinctly said, having been referred to some cases with regard to courts of inferior jurisdiction: "Those are cases of common law courts, which are inferior to the courts of Westminster Hall; but ecclesiastical courts are not so." Sir Frederick Pollock, who was arguing the case, admitted that in some senses they might be termed superior courts, and during the argument Sir John Campbell, who at that time was Attorney-General, said (2): "The authorities cited as to inferior courts do not apply to the spiritual courts, which are courts, Christian and superior, though liable to

(1) 4 Ad. & E. 433, 446.

(2) Ibid. 440.

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"prohibition if they exceed their jurisdiction." That case was argued in 1836, when the spiritual courts were much more active and vigorous than they are at the present day, when their jurisdiction has been taken away so far as the laity is concerned.

There has always been in England more than one system of law. The canon law and the civil law, which were administered in the church courts by civilians, are of antiquity approaching the common law, and constituted a body of law which was organized by the Confessor between 1072 and 1076 according to Makowet's History of the Church and other authorities. That body of law was very vigorous and had great effect in the days of the Plantagenets. The common law was existing side by side with the civil law, and there were the two sets of courts, the courts spiritual and the common law courts. The common law courts were generally called the King's courts, but there is no doubt—and there is the authority of Coke C.J. for saying it—that the ecclesiastical law was the King's ecclesiastical law. In the age-long conflict in England between the Church and State, during which the church courts were at one time seeking to extend their jurisdiction, and the common law courts were seeking to control that and extend their own jurisdiction, someone had to decide where the boundary line between the two different systems was to lie.

The civil law and the canon law were wholly different systems from the common law, and where there were two bodies, each of them vigorous courts presided over by great men and existing side by side, conflict was inevitable. It is worth recalling Lord Blackburn's words on this subject in *Mackonochie v. Lord Penzance* (1): "The ecclesiastical law of England is not a foreign law. It is a part of the general law of England—of the common law—in that wider sense which embraces all the ancient and approved customs of England which form law, including not only that law administered in the courts of Queen's Bench, Common Pleas, and Exchequer, to which the term common law is sometimes in a narrower sense confined, but also that law administered in Chancery and commonly called equity, and also that law administered in the courts ecclesiastical, that last law consisting of such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm—and form, as is laid down in *Caudrey's case* (2), the King's ecclesiastical law."

Lord Blackburn said in that case that there are three systems

(1) (1881) 6 App. Cas. 424, 446. (2) (1591) 5 Co. Rep. 1a. xr.

of jurisprudence in England : the common law in its narrower sense, which is the law administered in this court ; equity administered by the Chancellor ; and the ecclesiastical law administered in the King's ecclesiastical courts. All three were separate systems of law and existed side by side.

There was also another court, which was presided over by civilians and in which civilians practised, and this court again had its own separate body of law. That was the High Court of Admiralty. That was in effect a fourth system, because the law administered in the High Court of Admiralty, largely borrowed from the continental law, the ancient law of Brittany and the law and practice of merchants in the Mediterranean, was being administered as a separate branch of jurisprudence and this court also constantly found itself in conflict with the common law courts. There being these separate systems of law, someone, as I have already stated, had to draw the line and control the respective jurisdictions so that they did not constantly clash. Sir William Holdsworth in his History of English Law shows the never-ending dispute between the courts not only between the ecclesiastical and the common law courts, but even between the courts of Chancery and the common law courts, and, more especially, coming down to much more recent times, the great conflict which prevailed between the Court of Admiralty and the High Court. It seems to me that from a very early stage the King took on himself the duty, or the power or the right, of deciding on the boundaries between the common law courts and the ecclesiastical courts, and he did it by his writ of prohibition. That was in the early days—I speak on this with some hesitation—a prerogative writ issued by the King himself by virtue of his prerogative. Then in the year 1300, during the reign of Edward I., sometimes called the English Justinian, the statute “Circumspecte Agatis” was passed, in which the King limited the jurisdiction of the common law courts as against the ecclesiastical courts. The statute—I believe there is some dispute among learned authorities whether it is properly called a statute, but it is always quoted as such, and is to be found in the Statutes at Large—was directed by the King to his judges saying : “Use yourselves “circumspectly in all matters appertaining to the Bishop of “Norwich and his clergy,” and then setting out the matters in which the judges of the land were not to interfere. In that statute, and in the statute passed in the following reign of Edward II. called Articuli Cleri, there are set out in great detail

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those matters over which the ecclesiastical courts were to have exclusive jurisdiction. Briefly the effect was that in matters of purely temporal concern the common law courts were supreme; in matters which appertained to the Church, the church courts were supreme, and the "Circumspecte Agatis" ends with the words: "In all cases above rehearsed the spiritual judge shall have power to take knowledge notwithstanding the King's prohibition."

As a line had to be drawn and as it was from the common law courts that the prerogative writs came to be issued, it was not unnatural that the King's Bench should assume the right of issuing writs of prohibition to the spiritual courts prohibiting them from entertaining a case because it was outside the statutes *Circumspecte Agatis* and *Articuli Cleri*, and was a temporal matter within the jurisdiction of the common law courts. The King had issued the writ in the first instance, then his courts, which became the proper medium for issuing the prerogative writ, and to that extent thereby the Court of King's Bench controlled the activities of the ecclesiastical courts. But they never claimed, once the case was in a spiritual court, to call upon that court to return the record into the Court of King's Bench in order that the latter might examine the record, although there is no doubt that the Court of King's Bench had the power to issue a prohibition, even if the case had been heard, to prevent the court apparitors or proper officers from enforcing penances or other spiritual sanctions on the person who, it was adjudged, had offended. Lord Denman C.J. in *Ricketts v. Bodenham and Others* (1) pointed this out, when he said: "And there is no doubt that, in the case of prohibitions 'to be granted *for the sake of trial*'—by which I understand he meant to prohibit the trial—"as distinguished from those which "are to be granted upon account of a wrong trial or erroneous judgment, the rule is established, that a party neglecting to contest the jurisdiction in the first instance, and taking his chance of a favourable decree, shall not be allowed after sentence to allege the want of jurisdiction as a ground of prohibition, unless the defect appears on the face of the pleadings." Thus, the court would not interfere after trial except in a clear case where, on the face of the proceedings, it was shown that the court was acting without jurisdiction at all.

In my opinion, therefore, it does not follow that because prohibition would lie, *certiorari* must lie, for the reason that

(1) 4 Ad. & E. 441.

the spiritual courts are not inferior to this court. If they had been inferior courts, the judgments of this court would have been binding on them. Although no doubt great ecclesiastical judges in the past have paid attention to decisions of the King's Bench or of the other common law courts on a matter which was material to the case they were deciding, I do not think it has ever been suggested that the civilians at Doctor's Commons were bound by the decisions of the courts of common law in the same way that judges sitting at nisi prius are bound by the decisions of the whole court or as we in this court are bound by the decisions of the Court of Appeal and the House of Lords, because they were two separate jurisdictions, as separate for many purposes as can well be imagined. The ecclesiastical courts were administering a different system of law. That system was administered by different judges, and the advocates who appeared before them were not barristers but were doctors of civil law admitted by a different body and performing entirely different functions from common law lawyers.

In those circumstances, it is clear why prohibition would lie to the spiritual courts, although there has never been any attempt to issue a writ of certiorari. It is somewhat—I do not say wholly—analogous to the position that existed between the courts of common law and the court of the Chancellor before the Judicature Act, 1873. One of the reasons for what is called the fusion of law and equity into one system and one court was that the Chancellor from very early times right down to the time of the Judicature Act always asserted a right to restrain persons by injunction from either taking proceedings or pursuing their remedies even after they had obtained a judgment in the common law courts. In *B. O. Morris, Ltd. v. Perrott & Bolton* (1), recently decided in the Court of Appeal, a person recovered damages in respect of the same cause of action against two people and it was pointed out that although he had two separate judgments against two people, he was not to be permitted, where it was the same cause of action, to satisfy his judgment more than once. The means which existed for preventing him from doing that, although he had two perfectly good judgments, was for the Chancellor to restrain him because it would be against conscience that he should be paid twice over. That is not unlike the present position, because the Chancellor, although he did not issue prohibitions—prohibition being a prerogative writ, and the King having confided the exercise of

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his prerogative to the King's Bench—acted by means of injunction, which had the same effect, namely, of preventing the subject from pursuing his remedy in a common law court. Yet the Chancellor never claimed the right to inquire into the validity of a common law judgment by a writ of certiorari or any other means.

So, too, with regard to the High Court of Admiralty. The genius of Lord Stowell laid the foundations of the high regard in which the Court of Admiralty has been held in this country. Since about the year 1800, the books have been full of cases where this court has issued prohibitions to the Admiralty Court, which tried various devices for arrogating to itself business which the common law courts considered to be within their exclusive jurisdiction. Again—this will all be found set out in Sir William Holdsworth's History of English Law—from a very early stage, and during the Stuart period particularly, when great civilians like Sir Leoline Jenkins presided in the Court of Admiralty, there were constant conflicts between the common law courts and that court with regard to jurisdiction. The common law courts constantly issued prohibitions against the admiralty courts from proceeding with a case, but in no single case did they ever bring up by certiorari the proceedings in that court to be examined; and that seems to me to be because it was recognized that the Court of Admiralty was a High Court of Admiralty. It was a High Court of Admiralty just in the same way as the ecclesiastical courts were High Courts in their own particular sphere.

I summarize the matter thus—ecclesiastical courts are not inferior courts; they are as unfettered in spiritual causes as is the Supreme Court in temporal causes. If the former encroach or trespass on the temporal field the King, who is "supreme Governor in these his realms for all persons in all causes as well ecclesiastical as temporal," interferes by means of his prerogative writ of prohibition, the issue of which is entrusted to his High Court. Moreover, the writ of certiorari issues not only for the absence or excess of jurisdiction, but also for correcting and quashing judgments or orders of those courts from which error did not lie. If the writ could issue in the one case, I can see no reason why it should not issue in all. In theory, the judges of the common law courts have no knowledge of, or at least are not expert in, the system of law administered by the ecclesiastical courts and could not therefore presume to examine their records for the purpose of correcting their judgments.

The fact that, as Mr. Stranderson pointed out, an appeal lies from the consistory court to the Court of Arches, and now to the Judicial Committee of the Privy Council, does not affect the matter one way or the other. There always has been such a right of appeal, so that the subject who complained that the court had exercised a jurisdiction over him which it did not possess was not without remedy, because he always had an appeal from the court to the Dean of Arches or to the Chancery Court of York. Even from there he could always go to the steps of the Throne and ask for the prerogative to be exercised and the case taken before His Majesty in Council. Later, that was put on a statutory basis and the Court of Delegates was set up, which was followed by the Judicial Committee Act, 1833, whereby such matters came before the Judicial Committee of the Privy Council.

For these reasons, which I have expressed with some hesitation and some diffidence because, as I have said, in my opinion, it is quite enough for this court to say that it is not prepared to make a precedent after six hundred years when it finds no certiorari has been issued, I think the preliminary objection succeeds and that this court is bound to dismiss the motion with costs.

LEWIS J. In the course of the attractive argument presented on behalf of the applicants, I had some doubt whether the preliminary point taken by Mr. Gray was a good one, but on consideration I am quite satisfied, for the reasons given by the Lord Chief Justice, that the point is a good one. I agree entirely with his judgment.

OLIVER J. I agree.

Solicitors for the applicant : *Evill & Coleman.*

Solicitors for the respondents : *Tamplin, Joseph & Flux, for Gudgeons, Peacock & Prentice, Stowmarket.*

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Lord Goddard
C.J., Humphreys
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FUSSELL v. LICENSING COMMITTEE OF THE JUSTICES OF SOMERSET.

Justices—Licensing—Application for new justices licence—Bench equally divided—No order—Meeting adjourned for rehearing of application by reconstituted bench—Licence granted by reconstituted bench—Confirmation of licence refused by county Licensing Committee—Whether licence rightly before confirming authority—Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24), s. 10, sub-s. 3.

At a general annual licensing meeting of licensing justices the applicant applied for a new justices licence. The bench, consisting of six justices, heard the application in full and then the chairman announced that being equally divided they made no order but adjourned the meeting for three weeks when the application would be reheard by a reconstituted bench. At the adjourned meeting local resident objectors, through their legal representative, took two preliminary objections (1.) that the meeting being an adjournment only those justices who had sat at the previous hearing were entitled to sit to consider the application, and (2.) that the application had already been decided and refused at the previous meeting. The reconstituted bench, consisting of the original six and five other justices, granted the licence. On the licence coming up for confirmation by the county licensing committee the same objections were again put forward on behalf of local objectors and the committee decided that the licence was not rightly before them and made no order. On appeal by the applicant :—

Held, that the justices at the original hearing, being equally divided, had given no decision but, as they were entitled to do, had adjourned the application for rehearing by a reconstituted bench ; that they had an inherent and possibly statutory right to adjourn the hearing of the application and the licence properly came before the confirming authority, to whom the case must be remitted for adjudication.

CASE STATED by county of Somerset licensing committee.

At the adjourned general annual licensing meeting of the licensing justices for the petty sessional division of Keynsham on March 1, 1946, at which six licensing justices were present, Percy John Fussell made an application for a new justices licence to sell by retail intoxicating liquor, for consumption either " on " or " off " the premises intended to be known as the Compton Inn, situate at Compton Dando in the county of Somerset. The application was opposed by local residents. After hearing the solicitors for the applicant and the objectors and the evidence called by the parties respectively, the chairman of the justices announced the decision of the meeting in the following words : " The bench being equally divided on this

" application no order is made : and the adjourned General Annual Licensing Meeting is further adjourned until the 22nd March, 1946, and the case will then be reheard by a reconstituted bench at 11 a.m." At the further adjourned meeting on March 22 there were present eleven licensing justices including the six who sat on the previous hearing. The applicant and the local resident objectors were again legally represented, and two preliminary objections were taken on behalf of the objectors, namely—(1.) that the then meeting was an adjournment of the meeting held on March 1, 1946, and only those licensing justices who sat on March 1 could then sit to consider the application ; (2.) that the application had already been decided by the licensing justices on March 1. The meeting, having noted the above objections, proceeded to hear the application on its merits, and after a long hearing the chairman announced that the licence was granted, subject to certain conditions which were not relevant to the present appeal.

On April 30 the licence came before the licensing committee of the justices of Somerset, sitting at Taunton, for confirmation. The two preliminary objections raised on behalf of local resident objectors were again put forward, and the justices of the licensing committee decided that the licence was not rightly before them, and made no order thereon. The applicant appealed.

Colin Duncan for the appellant. If the justices, failing to agree, being equally divided, had made no order and had left the bench without saying anything more, then I agree it would have amounted to a refusal of the application ; but if they decide to adjourn the matter for rehearing before a reconstituted bench they have ample power to do so. The Licensing (Consolidation) Act, 1910, by s. 7 provides that where under that Act any power may be exercised by licensing justices, that power may be exercised by a majority of the justices present at a meeting assembled for the purpose. Section 10, sub-s. 3, empowers licensing justices to adjourn any general annual licensing meeting to such day and to such place within the licensing district as they think fit for meeting the convenience of intending applicants for licences. The licensing justices are not a court of summary jurisdiction but in my submission they have the same power in this matter.

[HUMPHREYS J. Do you say there is inherent power to adjourn ?]

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Yes, and if necessary, I shall contend that they have also a statutory power. The general power to adjourn is in s. 10, sub-s. 3, of the Act of 1910 (1). There is no statutory interference with that power. Looked at as a whole the decision of the justices on March 1, as announced by the chairman, can have no meaning other than that they ordered the application to be adjourned and reheard before a reconstituted bench. The licence granted at the adjourned meeting was rightly before the confirming authority.

[He referred to *Reg. v. Belton* (2) ; and *Rex v. Wandsworth Licensing Justices* (3).]

Vernon Gattie for the licensing committee. The local objectors who raised the points now under consideration are not represented on this appeal, but I am instructed to give the court any assistance in my power. I agree that the general annual licensing meeting can be adjourned, but it is arguable whether the justices have an inherent power to say that a case which has been fully heard shall be heard again before a reconstituted court. Powers conferred by the Summary Jurisdiction Act, 1848, have no application to courts sitting under the Licensing Acts.

[LORD GODDARD C.J. Surely the only question here is whether the justices, having given their decision, are *functi officio*.]

I should have great difficulty in arguing that they were *functi officio*.

LORD GODDARD C.J. stated the facts and continued : When the licence came before the licensing committee for confirmation objection was taken that the case was not properly before the confirming authority because, it was said, what had happened at the meeting of the justices on March 1, when the bench was equally divided, amounted to a decision, and that therefore the licence had been refused. Really the question depends on what was the true effect of the happenings on March 1—whether the justices gave a decision or whether

(1) Licensing (Consolidation) Act, 1910, s. 10, sub-s. 3 :—"The licensing justices may at any general annual licensing meeting adjourn the meeting to such day and to such place within the licensing district as they think fit for meeting the convenience of persons intending to apply for justices' licences, and a day and place for at least one such adjourned meeting shall be so appointed by the justices."

(2) (1848) 11 Q. B. 378, 379.

(3) [1937] 1 K. B. 144.

they merely adjourned the case—because in my opinion (and I think in the opinion of this court), there must be an inherent right in every court to adjourn a hearing when a matter comes before it, for whatever reason. One reason for which they can adjourn the hearing is that they are an even number of justices and they want the case tried before an uneven number, so that a majority decision may be given. There is no question but that, if at the hearing of an application for a licence the justices are equally divided, and therefore say that they refuse the application because a majority of the justices are not in favour of granting the licence, that amounts to an adjudication refusing the licence ; but in this case I think it is clear that what the justices meant was : We are not going to give a decision on this case ; we are going to adjourn it, so that it may be heard by a larger bench, and then a decision can be given. I think that that is the fair meaning of what the justices did, and it seems to me that they had an inherent right to do so, and also, in my opinion, a statutory right to adjourn the hearing.

It is conceded that the justices here are not to be regarded as *functi officio*, because they did not give a decision either granting or refusing the licence. They simply adjourned the hearing before them, to enable the case to be heard before a larger bench on another day. The larger bench heard the application and granted it. In my opinion, therefore, the matter came properly before the confirming authority and this case must be remitted to that authority with a direction that the case was properly before them and they must proceed to adjudicate upon it.

HUMPHREYS J. I am of the same opinion and for the same reasons.

LEWIS J. I agree.

Appeal allowed.

Case remitted.

Solicitors for appellant : *Godden, Holme & Co., for Daniel & Cruttwell, Frome.*

Solicitors for licensing committee : *Sharpe, Pritchard & Co., for Harold King, Taunton.*

A. W. G.

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WRIGHT AND ANOTHER v. ARNOLD.

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Oct. 31;
Nov. 1.

Morton,
Tucker and
Asquith L.JJ.

Landlord and tenant—Rent restriction—Application of Acts—Lease of shop with living rooms above—Sub-lease of living rooms without landlord's consent—Determination of tenant's interest—"Lawfully sub-let"—Question whether premises a "dwelling-house"—Burden of proof—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 15, sub-s. 3—Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 (1 & 2 Geo. 6, c. 26), s. 7, sub-s. 1.

Section 15, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1) is limited in its application to cases where the premises, part of which has been sub-let, are themselves premises within the Act. Consequently, where a tenant of premises not within the Act sub-lets a part of those premises the sub-section does not afford protection to the sub-tenant.

The presumption raised under s. 7, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 (1) that a dwelling-house is one to which the principal Acts apply does not arise unless the court is satisfied that the premises in question are a dwelling-house as defined in the Act of 1920.

Norman v. Simpson [1946] K. B. 158 discussed.

APPEAL from Wandsworth county court.

The plaintiffs were respectively the freeholder and the leaseholder of premises at No. 89, Hill Road, Streatham. On February 6, 1931, the freeholder demised them to James Walker (Jeweller), Ltd. The lease, which described the premises as "all that messuage shop and premises," was for fourteen years from December 25, 1930, at an annual rent of 550*l.* a year, and, besides the usual covenants for repairs and payment of rent, made detailed provision with regard to the

(1) By s. 15, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the

"tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

By s. 7, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, "If any question arises in any proceedings whether the principal Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown."

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

kind of business which might be carried on there. There was also a covenant by the company not to assign or underlet without the freeholder's consent, and a proviso for re-entry on breach of covenant. While the parties thus contemplated that some business would be carried on at the shop, no obligation was placed on the company to do so, nor was there any prohibition against use of the premises as a dwelling-house.

In 1937 the ground floor and basement were sub-let by the lessee company, with the freeholder's consent, to Delta Radio, Ltd., which had been formed by the second plaintiff, at a rent of 450*l.* a year. On March 25, 1939, the lessee company sub-let the upper part of the premises, with landlord's fixtures, for three years from that date, with option to continue for another year, and thereafter from month to month, at 90*l.* a year to the defendant, Mrs. Arnold, the licence of the freeholder not being obtained in respect of that sub-letting.

On March 18, 1941, the head lessees, James Walker (Jeweller), Ltd., wrote to the freeholder asking for a concession in the matter of rent as Delta Radio, Ltd. were unable to pay their full rent owing to war conditions, and referring to the fact that the upper part of the premises was sub-let to the defendant. The freeholder replied, agreeing to accept a reduction in the rent, and thereafter accepted rent with knowledge, thus acquired, of the unlicensed sub-letting to the defendant. On March 13, 1944, James Walker (Jeweller), Ltd. wrote to the freeholder about the expiry of their lease on the following December 24, and suggesting that the freeholder should "take over" the defendant's sub-tenancy of which particulars were given. On expiry of that lease the freeholder, by a lease dated December 25, 1944, demised the premises to the second plaintiff. As he wanted vacant possession, he brought this action against the sub-tenant, in which the freeholder joined, alleging that she was a trespasser, and claiming possession and mesne profits.

The county court judge held that the onus was on the sub-tenant to show that the premises were lawfully sub-let; that the freeholder's waiver of the right of forfeiture did not render legal what had at all times been illegal, since the landlord might not wish to forfeit the head-lease and if he did not so wish he did not recognize the legality but merely waived one specific remedy; and that the plaintiffs were entitled to possession since the sub-tenant was not, accordingly, a person to whom the premises had been "lawfully sub-let" within the meaning

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C. A. of s. 15, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. He therefore gave judgment for the plaintiffs for 25*l.* and made an order for possession.

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The sub-tenant appealed.

Brundrit (W. G. Wingate with him) for the sub-tenant. The county court judge gave his decision before *Norman v. Simpson* (1) came before the Court of Appeal. This case is indistinguishable from that, and the county court judge would not have decided as he did had the Court of Appeal's decision already been given at the time.

Comyn (Malcolm Wright with him) for the freeholder and the leaseholder. This case is distinguishable from *Norman v. Simpson* (1) because that decision is not applicable where the tenant who unlawfully sub-lets is not tenant of a house to which the Rent Restriction Acts apply. The premises here, as originally let, were not Rent Act premises, and, therefore, s. 15, sub-s. 3, of the Act of 1920 does not apply to protect this sub-tenancy. The premises, consisting of a shop with living quarters above, and let at a rent of 55*ol.* a year, were *prima facie* not within the Acts, and it was for the sub-tenant, if she could, to show that they were within the Acts. These being premises outside the Acts, it would be extremely hard on the landlord if the tenant were able, so to speak, to create a protected lacuna in an otherwise free house without his consent. The application of *Norman v. Simpson* (1) should be excluded from premises not within the Rent Restriction Acts. Passages in the judgments in that case show clearly that the court was speaking of premises within the Acts. Section 15, sub-s. 3, must be construed strictly, and its opening words are "Where the interest of the tenant of a dwelling-house to which this Act applies . . ." *Norman v. Simpson* (1) fell squarely within those words. In the present case the question of the applicability of the Rent Restriction Acts to the premises was not gone into in the county court. The onus of showing that they applied to the whole building must be on the sub-tenant seeking to bring a part of it within the exceptional provisions of s. 15, sub-s. 3; yet she called no evidence to discharge the onus. If, therefore, this case is distinguishable from *Norman v. Simpson* (1), it would seem that the appeal must fail. Were s. 15, sub-s. 3, applicable to premises outside the Acts, a sub-tenant to whom the

(1) [1946] K. B. 158.

premises had been sub-let without the landlord's consent would be able to claim that he had derived a protected sub-tenancy from a tenant whose tenancy was unprotected.

Brundrit in reply. The question on whom lies the burden of proving that premises are within the Act would seem to be concluded by s. 7, sub-s. 1, of the Act of 1938. It is in the interest of the freeholder and the leaseholder here to show that the premises are outside the Acts, and it is therefore for them to rebut the presumption which that sub-section raises.

On the question whether s. 15, sub-s. 3, of the Act of 1920 applies to premises outside the Acts, there is no direct authority. It is a point of fundamental importance, for, if the sub-section be held not to apply to premises outside the Act, not only unlawful but also lawful sub-tenancies of such premises will be left without protection, and it will not help a sub-tenant that his sub-tenancy was duly licensed by his landlord. [Morton L.J. That seems eminently reasonable. Why should an unprotected tenant be allowed to cast a mantle of protection over a sub-tenant?] The Acts apply to a part of a house or to a whole house. *Barratt v. Hardy Bros. (Alnwick), Ltd.* (1) shows that protected tenancies can be carved out of a whole which is not within the Acts. [Tucker L.J. Yes, but by quite different machinery from that in question here.] The opening words of s. 15, sub-s. 3, do not necessarily mean where the Act applies to the whole of a dwelling-house. They mean also that, where the interest of a tenant of anything which becomes a dwelling-house within the Act is determined, the sub-tenant of that dwelling-house shall be protected. In any event matters of this kind should always be looked at as far as possible from the point of view of the sub-tenant. Thus here, if the court is in any doubt as to which of the meanings contended for, for s. 15, sub-s. 3, is the correct one, it should lean towards the interpretation advanced by the sub-tenant. There is no hardship on the freeholder here in that view, because he could have protected himself as soon as he heard of the sub-tenancy. He cannot now turn round and, while admitting that the sub-tenant was lawfully in possession, refuse any longer to have her there on determination of the main tenancy.

[Morton L.J. Is not the argument based on s. 7, sub-s. 1, of the Act of 1938 sufficient for the sub-tenant's purposes here, provided that she can show that the property as a whole is a "dwelling-house" ?]

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It is not necessary to refer to the lease for the purposes of s. 7, sub-s. 1, for it is sufficient for the sub-tenant that the premises are prima facie a dwelling-house in that someone lives or can live, in part of them, in this case the part above the shop. It would be otherwise, of course, if the lease expressly provided that the premises were not to be used as a dwelling-house.

Comyn (invited to reply on the question of s. 7, sub-s. 1, of the Act of 1938). "Dwelling-house," in s. 7, sub-s. 1, has the same meaning as it bears throughout the Acts. When Parliament uses the highly technical term "dwelling-house," it must mean what it says. The sub-tenant, before she can rely on s. 7, sub-s. 1, must show that the premises are a dwelling-house. To find out if they are that one must look at the lease. Where the lease is silent in the matter, as it really is here, the sub-tenant cannot, surely, discharge the burden of establishing that the premises are a dwelling-house by pointing to the sub-tenancy which now exists.

In conclusion, it is formally submitted that *Norman v. Simpson* (2) was wrongly decided.

MORTON L.J. [after stating the facts :] The judgment of the county court judge foreshadows that subsequently delivered by du Parcq L.J. in *Norman v. Simpson* (2), where the court held by a majority, du Parcq L.J. dissenting, that the words "have been lawfully sub-let," in s. 15, sub-s. 3, of the Act of 1920, refer to the time just before the head tenancy determines, and that where a tenant, in breach of the terms of his tenancy, has sub-let premises to which the Act applies without first obtaining the consent of the landlord and the landlord continues to accept rent with the knowledge of the breach, the sub-tenant is, within the terms of that sub-section, a person to whom the premises had been "lawfully sub-let."

The sub-tenant now appeals, and it would appear at first sight that *Norman v. Simpson* (2), which was decided shortly after the county court judge's decision, governs this case and that this appeal should be allowed. Counsel for the freeholder and the leaseholder has, however, argued five points. First, he raised a question of costs, as to which I need say nothing at the moment. Secondly, he argued that s. 15, sub-s. 3, does not apply to a case where the tenant who sub-lets is not the tenant of a dwelling-

(1) [1944] K. B. 679.

(2) [1946] K. B. 158.

house to which the Act applies; and that that sub-section is limited to a case where a tenant of a dwelling-house to which the Act applies sub-lets the whole or part of that dwelling-house, and does not apply to a case where a tenant of premises which are not within the Act sub-lets the whole or part of those premises. I think that argument well-founded. It seems to me that that is the natural meaning of the words used in the sub-section, and that the sub-section only applies (to quote the opening words) "where the interest of a tenant of a dwelling-house to which this Act applies is determined," in certain circumstances. It is true that in *Barrett v. Hardy Bros. (Alnwick), Ltd.* (1) Bankes and Scrutton L.JJ., felt compelled to put what I think they considered to be a somewhat strained construction on s. 12, sub-s. 3, of the Act of 1920, which deals with apportionment; but, for my part, I do not feel constrained, for that or any other reason, to put on the language of s. 15, sub-s. 3, a meaning which, to my mind, the words do not properly bear. It seems to me that, unless the interest of James Walker (Jeweller), Ltd. was an interest in a dwelling-house to which the Act applies, the section would have no operation in the present case.

However, the matter does not end there. Mr. Comyn submitted for the freeholder and the leaseholder that it was for the sub-tenant to produce evidence that the premises came within the wording of the section. That might well be so but for the language of s. 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938. Mr. Brundrit, for the sub-tenant, at first submitted that that was a complete answer to Mr. Comyn's argument, and that, as the freeholder and the leaseholder had failed to discharge the onus which was cast upon them, the sub-tenant must succeed. However, I do not think that the sub-section has such a far-reaching effect as that. It seems to me that it can only apply where it is first established that the premises as to which the question arises are "a dwelling-house." That, I think, means a dwelling-house within the definition contained in the Act. The intention of the sub-section is, in my view, that, when the court is satisfied that the building as to which the question arises is "a dwelling-house," then it shall be deemed to be a dwelling-house to which the Act applies unless the contrary is shown.

It is, therefore, I think, necessary for this court to consider,

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on the somewhat scanty evidence before it, whether this building, No. 89, High Road, Streatham, is or is not a dwelling-house in the sense in which that word is used in the Act.

The definition of "dwelling-house" in s. 12, sub-s. 2, of the Act of 1920 is: "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed"—then follow certain figures—"and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies: Provided that . . . (ii.) the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes." That is followed by s. 3, sub-s. 3, of the Act of 1939, which, so far as material, is as follows: ". . . the application of the principal Acts, by virtue of this section, to any dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes."

What are the facts in regard to No. 89, High Road? There is the description in the lease; there is no provision in the lease either that the premises shall be used for business or that they shall be used for residential purposes; there is no prohibition against user as a dwelling-house; and there is a limited prohibition against the user of the premises or any part thereof for certain trades. So far, the lease does not throw a very strong light on the matter one way or the other. The other fact which, I think, the court is entitled to take into account is that the sub-tenant took up her residence in the premises. According to the evidence, the upper part was let to her as a dwelling-house, and there is nothing in the evidence or in the correspondence to indicate that there was any structural alteration in the premises to render that possible. I think that the fair conclusion to draw from the evidence, although it is not made very clear one way or the other, is that this is the sort of building, with which one is so familiar, in which there are dwelling-rooms above and a shop below. The nature of the premises was left in some obscurity in the county court. At first I felt hesitation whether the matter should be sent back to the county court judge; but, on the whole, I have come to the conclusion that it is for this court to reach a decision on such evidence as is available. It seems to me that it is a fair conclusion to draw from the evidence that these premises are a "dwelling-house."

Thus, the burden is on the freeholder and the leaseholder to show that the dwelling-house does not come within the Act. This they failed to do, as there was no evidence as to the rateable value. It follows that, so far, the sub-tenant has brought her case within s. 15, sub-s. 3, of the Act of 1920, and that there has been a sub-letting to her of a dwelling-house to which the Rent Restriction Acts apply.

The third point taken by Mr. Comyn is that the upper part was not "lawfully" sub-let. He argued that *Norman v. Simpson* (1) does not cover the present case because the freeholder here had not such a full knowledge of the facts of the sub-letting as had the head lessor in that case. I cannot accede to that argument. The freeholder knew that the premises had been sub-let to the sub-tenant, and he continued to accept rent after that. He also knew (if it is material) the rent which she paid.

Fourthly, counsel submitted that we should in some way extend the principle of *Morrison v. Jacobs* (2) to this case and regard the landlord as having accepted the rent unwillingly and under some form of compulsion. Again, I cannot accede to that argument. When the breach of covenant came to the landlord's notice, he had his option either to take proceedings to recover possession or to accept the rent and waive the breach. He chose the latter course.

Finally, counsel submitted, without of course arguing the point, that *Norman v. Simpson* (1) was wrongly decided. He did that in order to keep the point open if this case should go further.

I have come to the conclusion that the sub-tenant has succeeded in bringing herself within s. 15, sub-s. 3, having regard to the construction which was put upon that section by the majority of the court in *Norman v. Simpson* (1). That being so, the appeal, in my view, succeeds. On the question of costs, Mr. Comyn suggests that, because the plaintiffs will in any event recover 50*l.*, whether as rent or as mesne profits, and as this is an appeal from the whole of the judge's judgment, the successful sub-tenant should not be allowed the whole of her costs. I cannot accede to that argument. It seems to me that the real contest here has been this: are the freeholder and the leaseholder entitled to possession or are they not? In that real contest the sub-tenant has succeeded.

TUCKER L.J. I agree. I do not desire to add anything

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(2) [1945] K. B. 577.

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with regard to some of what may be called the subsidiary points relied upon by Mr. Comyn to distinguish this case from *Norman v. Simpson* (1). I agree with all that has been said on those points by my Lord.

I desire only to refer to what I regard as the principal point put forward by Mr. Comyn, which, I think, requires careful consideration. He said that *Norman v. Simpson* (1) was a case where, on the admitted facts, the whole premises, which included the part that had been sub-let, were at all times premises within the Rent Restriction Acts, whereas in the present case there was no evidence to show that the premises in their entirety were a dwelling-house to which the Acts apply. That appeared to be on the face of it a formidable point, because I agree that, on the true construction of s. 15, sub-s. 3, of the Act of 1920, in order to bring that sub-section into operation it is necessary that the premises the tenancy of which has determined should be a "dwelling-house" to which the Act applies. But Mr. Comyn's difficulty is s. 7, sub-s. 1, of the Act of 1938, which seems to me to be a complete answer to his point, provided always that the premises with which we are dealing appear to the county court judge on the evidence before him to be a "dwelling-house" within the meaning of that phrase as applied to the Restriction Acts, whether by the express provision of the Acts or by judicial interpretation. The only question here is whether there was evidence before the county court judge that the premises in respect of which the question had arisen were *prima facie* a dwelling-house, so that the presumption in s. 7, sub-s. 1, would take effect. I think that there was material before him from which, in the absence of any evidence to the contrary, he would be bound to assume that he was dealing with a dwelling-house. The factors were that there was a neutral provision in the lease, which has been referred to by my Lord, which indicated that the premises consisted of something beyond a shop—that they included other rooms; that there was no prohibition in the lease against using any part of the premises as a dwelling-house, and that there was evidence that some part of that house was in fact being or had been so used, although that user had been brought about by a sub-letting which was contrary to the lease. For these reasons I think that s. 7, sub-s. 1, of the Act of 1938 applies, and, therefore, that it is impossible to distinguish this case from the decision of this court in *Norman v. Simpson* (1).

(1) [1946] K. B. 158.

ASQUITH L.J. I agree with both the reasoning and the result of the judgments delivered by my Lords.

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Solicitors for plaintiffs: *Warren & Co.*Solicitors for defendants: *Sherrard & Sons.*

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Food and drugs—Sale to the prejudice of purchaser—Article not of quality demanded—Whisky containing excess water—Excise certificate delivered with whisky—Certificate contained statement of strength of spirit delivered—Defence, whisky purchased with written warranty—Whether excise certificate was written warranty—Spirits Act, 1880 (43 & 44 Vict., c. 24), ss. 105 and 108; Fourth Schedule—Finance Act, 1935 (25 & 26 Geo. 5, c. 24), s. 14—Food and Drugs Act, 1938 (1 & 2 Geo. 6, c. 56), s. 84, sub-s. 5.

The licensee of licensed premises was charged with having sold a certain food, namely, whisky, which was not of the quality demanded by the purchaser. Upon analysis the whisky was found to contain fourteen per cent. of added water. The whisky was taken from a new sealed bottle which had been delivered the previous day and which had been kept in a locked receptacle. An excise certificate was delivered with the whisky which, in accordance with the provisions of the Spirits Act, 1880, was required to state the strength of the spirit sold or delivered. The excise certificate stated that the whisky was thirty per cent. under proof on which strength the excise duty had been computed. The Finance Act, 1935, makes it an offence for spirits delivered in bottles by a dealer to be sold at a strength lower than that by reference to which the excise duty chargeable thereon had been computed. The licensee raised the defence provided by s. 84 of the Food and Drugs Act, namely, that the whisky was purchased with a written warranty, to wit, the excise certificate, and that when sold the whisky was in the same state as when purchased. The magistrate found that the whisky when sold was in the same state as when purchased and that the licensee had no reason to believe that it was otherwise than that of the substance and quality as would have entitled him to sell, but that the excise certificate was neither an invoice nor a written warranty:—

Held, that inasmuch as a licensee when he purchases spirits from his dealer knows that he will receive with it an excise certificate which must state the strength of the spirits, and inas-

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much as a dealer commits an offence if he delivers spirits at a different strength to that stated on the excise certificate and that on which excise duty has been computed and paid, the licensee was entitled to rely upon the excise certificate as a written warranty affording a defence to the proceedings, but that it did not amount to an invoice.

CASE STATED by a Metropolitan police magistrate.

Two informations were preferred by the respondent, Horace Donald Luke, a sampling officer of the City of Westminster at the Marlborough Street Magistrates' Court, under s. 3 of the Food and Drugs Act, 1938, one against the appellant Sneesby, and the other against the appellant Follett for having on April 2, 1946, at the Audley Hotel, Mount Street, sold to the prejudice of the respondent a certain food, namely, whisky which was not of the quality of the article of food demanded by the respondent in that it contained 14 per cent. of excess water.

The informations were heard by the magistrate on May 3, 1946 and on July 18, 1946, he gave judgment by which he found the case proved against each of the appellants but he dismissed each of the informations upon payment of five guineas costs by each appellant.

At the request of the appellants he stated the following case.

Upon the hearing of the informations the following facts were proved or admitted. On April 2, the respondent purchased two whiskies at the Audley Hotel, of which premises the two appellants were joint licensees. Upon analysis the whisky was found to contain 14 per cent. excess water. The whisky served to the respondent was taken from a new sealed bottle which had been delivered the previous day by Tanqueray Gordon & Co., Ltd. The bottle had been kept first in a locked cellar then in a locked cupboard in the office from which it was fetched when the respondent asked for whisky. An excise certificate accompanied the delivery of the whisky as was required by law and was delivered therewith to the appellants' cellarman. The certificate stated in accordance with the provisions of the Fourth Schedule to the Spirits Act, 1880, the name and address of the persons delivering the spirit, the name and address of the persons to whom it was delivered, the quantity of spirits, namely, eight gallons of whisky and the strength of the spirit, namely 30 degrees under proof. An invoice in respect of the said whisky was received some days

later ; and this invoice contained a written warranty which, however, was not pleaded.

The appellants raised the defence provided by s. 84 of the Food and Drugs Act, 1938, namely, that they purchased the whisky with a written warranty, to wit, the excise certificate mentioned above, and that when sold the whisky was in the same state as when they purchased it and that they had no reason to believe that it was otherwise than of the substance and quality which would entitle them to sell.

On the part of the appellants it was contended : (a) that the excise certificate was an invoice, and therefore by reason of s. 84, sub-s. 5, a written warranty ; (b) that if not an invoice it was none the less a written warranty within the ambit of s. 84 of the Food and Drugs Act, being a certificate signed by one A. Hughes on behalf of Tanqueray Gordon & Co., Ltd., that the duty had been paid before removal of certain spirits from Tanqueray Gordon & Co., Ltd., at Goswell Road to the appellants' premises in Mount Street, the spirits including eight gallons of Scotch whisky strength 30 degrees under proof ; (c) that s. 14 of the Finance Act, 1935, makes it an offence for a dealer to sell spirits delivered in a bottle at a strength lower than that by reference to which the excise duty chargeable thereon was computed. The purpose of the certificate was therefore to certify or warrant : (1.) that duty had been paid upon whisky based upon a strength of 30 degrees under proof ; (2.) that the whisky was delivered at the same strength at which the excise duty had been computed, namely, 30 degrees under proof ; (d) it was further contended that whether or not the excise certificate formed part of the contract of sale between Tanqueray Gordon & Co., Ltd., and the appellants it was nevertheless a written warranty required by law and supplied by and signed on behalf of Tanqueray Gordon & Co., Ltd. ; (e) that the law had been changed by the Food and Drugs Act, 1938, and the Sale of Food (Weights and Measures) Act, 1926, and under both these statutes documents such as an invoice or a label could be pleaded as warranties although not given in pursuance of any stipulation in the contract of sale.

On the part of the respondent it was contended that the excise certificate was neither an invoice nor any other written warranty.

The magistrate, being of opinion that the contention of the respondent was correct, held that : (i) the whisky was sold in

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the same state as when purchased and that the appellants had no reason to believe that it was otherwise than that of the substance and quality as would have entitled them to sell; (ii.) the excise certificate was not an invoice because (a) it did not include the price of the goods, and (b) another document was produced and exhibited by the appellants which purported to be, and, in fact, was, the invoice for the said whisky; (iii.) the excise certificate was not a written warranty within the meaning of the Act for the following reasons (a) it contained no express warranty in writing; (b) it merely certified that the excise duty applicable to a certain quantity of whisky of a certain strength had been paid to the revenue, and authorized the removal of the said whisky, the words thereon 30 degrees under proof were merely words of description; (c) while it was an offence for a dealer to sell spirits delivered in a bottle at a strength lower than that by reference to which the excise duty chargeable thereon was computed, it did not follow that spirits so delivered were in fact of the same strength as that by which the excise duty had been computed, or that an excise certificate was a warranty to that effect; indeed, the appellants' case rested on the contention that the whisky in question must have been delivered at a strength lower than that stated in the certificate; (d) the said certificate did not form and was not intended to form any part of the contract between Tanqueray Gordon & Co., Ltd., and the appellants in respect of the said whisky.

The magistrate therefore found the appellants guilty of the said offence, but in consideration of the fact that the invoice contained a valid written warranty which might have been pleaded had it not been overlooked he dismissed the informations under the Probation of Offenders Act on payment by each of the appellants of five guineas costs.

The question for the determination of the court was whether on the facts the determination of the magistrate was right in point of law and if not what should be done in the premises.

Slade K.C. and *James Burge* for the appellants. The excise certificate constituted an invoice within s. 84, sub-s. 5, of the Food and Drugs Act, 1938, which provides that a name or description entered in an invoice shall be deemed to be a written warranty. It was held in *Jeynes v. Hindle* (1), a case under the Food and Drugs Act, 1875, the language of which Act is

(1) [1921] 2 K. B. 581.

very similar to that of the present Act, that in order that the warranty should be effective as a defence it must have been a term of the contract that there should be a written warranty. An invoice is never part of the contract. If that decision is still in force as being the law, sub-s. 5, of s. 84 is quite nugatory, but that sub-section involves an alteration in the law. In any event the excise certificate, even if it is not an invoice, is a written warranty and therefore comes within s. 84. It has by law to be delivered by a dealer in spirits when the spirits are delivered to the purchaser in order to show that the dealer has paid the excise duty on the spirit. Section 105, sub-s. 5, of the Spirits Act, 1880, prohibits the delivery of spirit from the stock of a dealer unless it is accompanied by a certificate, except in the case of spirits not exceeding one gallon in quantity, and s. 108 provides that the certificate must be taken from a book to be obtained from the proper officer, and that it must be delivered with the spirits to the person to whom the spirits are entered in the certificate, and that it must contain the particulars specified in Sch. IV to the Act, which provided that amongst other things the certificate must contain the quantity, denomination and strength of the spirit delivered. Section 14 of the Finance Act, 1935, makes it an offence if spirits delivered in bottles are sold by a dealer in spirits at a strength lower than that on which the excise duty chargeable thereon was computed and which was stated in the certificate. It was stated in the excise certificate that the whisky delivered with the certificate was 30 degrees under proof. That was a written warranty that it was of that strength and the appellants were entitled to rely upon that warranty. They would have a cause of action against the dealers for breach of that warranty and it would be no defence to such an action that the document did not contain the word "warranty." The appellants have therefore a good defence to these proceedings in the warranty contained in the excise certificate.

Vernon Gattie for the respondent. It has been held under the Food and Drugs Acts, that a written warranty in order to form a good defence to proceedings under the Acts must have been given as part of the original contract between the seller and the buyer. In the present case the excise certificate was not given as part of the original contract, but owing to the requirements of the law. The question is whether an excise certificate can be held to be a warranty from the dealer in spirits to the purchaser. The sections of the Spirits Act,

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1880, which require an excise certificate to be delivered with the spirits do not deal with the question of warranty but with the removal of spirits from the dealer's warehouse. Before spirits can be removed from the dealer's warehouse the dealer must enter in the excise certificate the particulars required by the Spirits Act. That does not form part of the contract of sale between dealer and purchaser. It is not stated in the case whether the contract was an oral or a written contract. The excise certificate is merely a statement that the duty has been paid and does not amount to a written warranty as to the strength of the spirit upon which the purchaser of the spirits from the dealer can rely as a defence to proceedings under the Food and Drugs Acts of selling an article of food to the prejudice of the purchaser.

LORD GODDARD C.J. These are two special cases stated by a metropolitan police magistrate. Two prosecutions were brought under the Food and Drugs Act, 1938, in respect of the sale of whisky. According to the facts on April 2, the respondent the inspector of the local authority under the Act, purchased some whisky at the appellants' premises, and the whisky was found on analysis to contain 14 per cent. of excess water. The magistrate has found all the facts in the appellants' favour, namely, that the whisky had been delivered from the dealers, using the word "dealer" in the technical sense in which it is used in relation to spirits. It was sold from a bottle which had not been opened; it had been properly taken care of in locked premises between the time of delivery and the time of sale. When the whisky was analysed, it was found that the whisky had 14 per cent. of added water, and was not of the strength of 30 degrees under proof, which in the circumstances, can only be attributed to the dealers, in view of the facts that have been found. The only question raised in the case is whether or not the seller was protected by a written warranty. The document which was produced and relied on as the written warranty is a document known as an "Excise certificate for the removal of duty paid spirits." That is a document which is given pursuant to the Spirits Act, 1880. Under that Act, s. 105, sub-s. 5: "No spirits may be sent out "or delivered from the stock of a dealer unless accompanied "by a certificate, except spirits not exceeding in quantity "one gallon at a time sold by him under an additional licence "or a licence to retail to a person not being a dealer or retailer."

Then under s. 108, it is provided : “ (1.) Every rectifier, dealer
 “ and retailer must, by written request, obtain from the proper
 “ officer a certificate book containing forms of certificates and
 “ counterfoils, for which he must give a receipt. (2.) Before
 “ sending out or delivering any spirits required to be accom-
 “ panied by a certificate, he must enter in one of these
 “ certificates, and in its counterfoil, the particulars specified
 “ in that behalf in the Fourth Schedule, and must sign the
 “ certificate. (3.) He must deliver the certificate with the
 “ spirits to the person to whom the spirits are entered in
 “ the certificate.” Sch. IV to the Act says what the
 certificate is to contain. Among other things, it is to contain :
 “ Quantity, denomination, and strength of spirit sent out or
 “ delivered.” Under s. 14 of the Finance Act, 1935 : “ If any
 “ spirits delivered in bottle from a warehouse for home con-
 “ sumption are sold by a dealer in or retailer of spirits at a
 “ strength lower than that by reference to which the customs
 “ duty or the excise duty chargeable thereon was computed,
 “ he shall, for each offence, be liable on summary conviction
 “ to a fine not exceeding 50*l.*” So that he commits an offence
 if, having given a certificate showing the strength of the spirits
 delivered or to be delivered, he delivers the spirits at a different
 strength to that on which the duty has been paid. Therefore,
 when a proprietor of a hotel or public house orders spirits from
 his dealer, he knows that he will receive with it an excise
 certificate, and that one of the things that the excise certificate
 must state is the strength of the spirits.

Thereupon, it seems to me that the excise certificate is about
 as clear and conclusive a written warranty as anybody can
 possibly require or possibly give. I think that if this case had
 been confined to the argument that this certificate was a
 warranty, possibly a different decision might have been arrived
 at, but the point seems to have been taken in the case that the
 certificate was an invoice, because under sub-s. 5 of s. 84 of the
 Food and Drugs Act, 1938, it is provided that : “ For the
 “ purposes of this and the next succeeding section, a name or
 “ description entered in an invoice shall be deemed to be a
 “ written warranty that the food or drug to which the entry
 “ refers is of such a nature, substance and quality that a person
 “ can sell, or otherwise deal with it, under that name or
 “ description without contravening any of the provisions of
 “ this Act.” This document I think, is clearly not an invoice ;
 it was not intended to be an invoice. But it is not only an

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invoice on which a purchaser can rely ; he can rely on any warranty provided it is a written warranty. Then it is said there are cases which show that the written warranty must form part of the contract, in other words, that a person must stipulate for a written warranty. Where two persons are dealing with an article which can only be supplied in law provided it is accompanied by a particular document, and where that document is a statement which in law must amount to a warranty, it is part of the contract that this warranty shall be given and received, because the law requires it shall be given and received. In this case it appears to me as clear as it can be that the sellers, Tanqueray Gordon & Co., Ltd., knew they had to give, and did send, this written statement with the goods, and the written statement is that the goods are " eight gallons of whisky 30 degrees under proof," and that is a warranty that the goods are 30 degrees under proof. The fact that it is given for the purpose of the Spirits Act does not make it any the less a warranty, and it seems to me that it would be very hard in a case of this sort if the purchaser were not entitled to rely on that document, because it is a document which is not only given in pursuance of an Act of Parliament, but if any alteration had taken place in the strength of the spirit after it was given to the Customs and Excise authorities, the person giving it would have incurred a serious penalty. In my opinion in both of these cases the appeal succeeds, and succeeds with costs.

HUMPHREYS J. I agree. I should have thought it desirable to add my own view to those of my Lord, seeing that we are differing from a learned magistrate of great experience. My Lord has, however, expressed much more clearly than I could hope to do precisely the view I have of this case, and I can only say I agree, and for the same reason.

LEWIS J. I agree.

Appeals in both cases allowed.

Solicitors for appellants : *J. E. Lickfold & Sons.*
Solicitors for respondent : *Allen & Son.*

R. F. S.

REX v. MILLS AND LEMON.

C. C. A.

1946

Dec. 9.

Criminal law—Evidence—Police inquiries—A and B charged—Statement of A, implicating B.—Verbal précis of statement given to B by police—Reply invited—Statement of B, in reply, being a confession—Intelligible without terms of question—Admissibility of B's confession—"Judge's Rules" r. 8.

Lord Goddard
C.J.,
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Lewis JJ.

Where A and B are charged with the same offence and a statement has been taken from A, implicating B in the offence, if a police officer gives a verbal précis of A's statement to B and then by a question invites a reply in breach of r. 8 of "The Judges' Rules," no evidence can be given at the trial of B of what the police officer has said and done, since, if it were, the jury would be informed that A, who might not be called as a witness, had accused B of complicity in the offence. But if B, in consequence of the police officer's question makes a statement, which amounts to a confession, that statement can be given in evidence at the trial, unless B's statement is not intelligible without the officer's action and question also being given.

APPEALS by Kenneth Leslie Mills and John Lemon from convictions at Bristol Quarter Sessions for that they on April 26, 1946, stole 200*l.* 11*s.* 0*d.* in money from the person of Edwin Arthur Kelly.

At the trial of the two appellants and another H, the case for the prosecution was that, on April 26, four persons, West, an American soldier, the two appellants and H, were concerned in snatching a canvas bag containing money for the payment of wages, from the person of Edwin Arthur Kelly in Ralph Street, Bristol. The appellant John Lemon was arrested on June 2, 1946. At the Central Police Station on that day Inspector Phillips, a police officer said to Lemon in the presence of another police officer: "An American soldier named West " has been arrested and has made an admission that on April 26 " last he was concerned with you and your friends H and Mills " in robbing a Mr. Kelly of over 200*l.*" The inspector then gave a verbal précis of the written statement made by West and continued: "Do you wish to offer any explanation of " your position in the matter?" He then cautioned him. Lemon replied: "I will think it over," and shortly afterwards said: "I would like to write out my own statement." He then wrote out a statement which contained a confession and then signed it. On June 4th Kenneth Leslie Mills went voluntarily to the Central Police Station, Bristol where Sergeant Bartlett, a

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police officer, said to him : " An American soldier named West " has been arrested and has admitted that he was concerned with " you and your friends H and Lemon in robbing Mr. Kelly." The sergeant then gave a verbal précis of the written statement made by West and continued : " Do you wish to give any " explanation or wish to say anything about your part in the " robbery ? " He then cautioned him. Mills then wrote out a statement which contained a confession and signed it.

Counsel for the appellants at the trial, in the absence of the jury, objected to the admission of the two confessions by Lemon and Mills. The recorder ruled that the questions put by the police officers to Lemon and Mills were inadmissible ; but he ruled that the written statements subsequently made by each of the appellants in reply which amounted to confessions, were admissible. Accordingly the two statements were admitted.

Mills and Lemon were convicted ; H was acquitted and Lemon and Mills appealed.

By the memorandum by H.M. Judges of the King's Bench Division on " Police Inquiries " known as " The Judges' " Rules " :

" 3. Persons in custody should not be questioned without " the usual caution being first administered."

" 8. When two or more persons are charged with the same " offence and statements are taken separately from the persons " charged, the police should not read these statements to the " other persons charged, but each of such persons should be " furnished by the police with a copy of such statements, and " nothing should be said or done by the police to invite a reply. " If the person charged desires to make a statement in reply, " the usual caution should be administered."

F. Bates for the appellant Lemon. Inspector Phillips, although he did not read West's written statement to Lemon, gave to him a verbal précis of it and then said : " Do you wish " to offer any explanation of your position ? " This transgressed two of the provisions of r. 8 of " The Judges' Rules." Further, the police officer did not caution Lemon until after he had put this question, thus violating the terms of r. 3. If the questions were inadmissible, it follows that the answer provoked by them must also be inadmissible and the statement in reply made by Lemon was not admissible in evidence at his trial.

C. M. Lavington for the appellant Mills. It is clear that when Sergeant Bartlett read West's statement to Mills, he had made

up his mind to charge him. Accordingly both question and answer were inadmissible. (Humphreys J. referred to *Rex v. Gardner and Hancox* (1).)

G. H. Grundy for the Crown was not called on.

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LORD GODDARD C.J. delivered the judgment of the court :— It has been contended that the confessions of Lemon and Mills were obtained in a manner contrary to r. 8 of the rules commonly known as “ The Judges’ Rules.” It is clear that the police did not observe this rule which has been laid down by the judges of the King’s Bench Division for the guidance of the police on inquiries and the sooner the police at Bristol study, learn and abide by these rules, the better. [His Lordship then read r. 8.] If the police had handed copies of the statement made by West to each of the appellants and left each of them to decide whether or not he would make a reply, the rule would have been complied with and no objection could have been taken. In fact in the case of each appellant a police officer, although he did not read West’s statement, gave to each a verbal précis of what West had said and then asked each appellant whether he wanted to make an explanation. The police invited replies from the appellants.

The appellants contend that the replies which they made to this invitation are inadmissible in evidence. What lies at the root of r. 8 is the prevention of a police officer giving before a jury by means of his questions a statement of a person also charged of the complicity of the prisoner, when that person may not be called as a witness. There used to be a practice—I remember it very well when I first went on Circuit—that a police officer would give evidence before the jury saying : “ I saw the prisoner. I told him that John Smith had been “ arrested and that John Smith had made a statement : “ ‘ Yes, I was there at the scene of the crime and the prisoner “ ‘ was with me ’ and then the prisoner made such and such a “ reply,” perhaps denying his presence at the scene of the crime. That was a means of getting before the jury the statement by John Smith that the prisoner was involved together with himself in the crime, although John Smith might not be called as a witness. On this ground such a question put by the police ought not to be given in evidence. Then, if the explanation or reply given by the prisoner to the police officer is not intelligible without the terms of the police officer’s question

(1) (1915) 11 Cr. App. Rep. 265.

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being given to the jury, the answer also must be inadmissible. But if after such a question by a police officer, which cannot be given in evidence, the prisoner chooses to dictate or write a confession, there is no authority that if the answer is intelligible without a recital of the question it cannot be given in evidence. There is indeed, a decision that it can : see *Rex v. Gardner and Hancox* (1). This decision was given before the publication of r. 8 of the " Judges' rules," the first four of which were published in 1912 and the rest some time subsequently. Rule 8 does not prescribe that the answer made by a person charged to a question by a police officer, which transgresses the rule, cannot be given in evidence, though, as I have said, if the answer is only intelligible by reference to the question, it cannot be given in evidence. The decision of the recorder that no evidence could be given of the circumstances preceding the making of these two confessions was correct, since the giving of that evidence would have enabled the police to put before the jury the information that West had made a statement that each of the appellants was present when the robbery was committed. But the confessions of the appellants were intelligible without the evidence of what had preceded their being made and the recorder was right in holding them to be admissible with the inevitable result that both appellants were convicted. The appeals must be dismissed.

Appeals dismissed.

Solicitor for Mills : *The Registrar of the Court of Criminal Appeal.*

Solicitors for the Crown : *Robins, Hay & Waters for the Town Clerk of Bristol.*

(1) (1915) 11 Cr. App. Rep. 265.

C. G. M.

1946
Dec. 16.

CHESTERTON RURAL DISTRICT COUNCIL v. RALPH THOMPSON, LIMITED.

Lord Goddard
C.J.,
Humphreys and
Lewis JJ

Local government—Housing—Approval or rejection of plans for new buildings—"Satisfactory provision . . . for the drainage of the "building"—Meaning of "drainage"—Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 49), s. 37, sub-s. 1.

The Public Health Act, 1936, by s. 37, sub-s. 1, provides that :
"Where plans of a building . . . are, in accordance with building byelaws, deposited with a local authority, the authority shall reject the plans unless either the plans show that satisfactory

"provision will be made for the drainage of the building . . . ,
 "or the authority are satisfied that in the case of the particular
 "building . . . they may properly dispense with any provision
 "for drainage."

"In this section the expression 'drainage' includes the convey-
 "ance, by means of a sink and any other necessary appliance, of
 "refuse water and the conveyance of rain water from the roof."

The words "satisfactory provision will be made for the drainage
 "of the building" refer to the drains of the particular building,
 and not to the system of drainage, and therefore a local authority
 in considering whether to approve or reject plans submitted to them
 are not entitled to take into account matters outside the drains of
 the particular building.

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 LD.

CASE STATED by court of quarter sessions.

Some time before 1938 Ralph Thompson, Ltd. (hereinafter called the company) purchased certain land at Girton and Impington in the county of Cambridge, with a view to developing it as a building estate. The land is now known as the Thornton Estate. In or about February, 1938, the company deposited plans with the Chesterton Rural District Council (hereinafter called the council) in accordance with the council's by-laws made under s. 61 of the Public Health Act, 1936, and those plans were approved by the council. In accordance with the said plans the company built a hundred and three houses fronting on to a street which the company constructed, now known as Thornton Road, and also constructed and laid its own private sewer into which the water, night soil and other drainage from each of the houses discharged, and thence into septic tank No. 1, also constructed by the company and the plans of which were approved by the council. In or about September, 1939, the company deposited further plans for a hundred and one houses and twelve flats which were approved by the council. In accordance with these further plans the company built three houses and two flats, the drainage from which discharged into a private sewer and thence into septic tank No. 2, also constructed by the company. The company proposed to build in accordance with the approved plans, as a stage in further development, twenty-four houses and ten flats, but the war intervened and building ceased. This further development was to have drained into the private sewer and septic tank No. 2. On August 28, 1945, the company gave notice to the council that it wished to recommence building in accordance with the approved plans, but the council served a notice, dated October 9, 1945, on the company under s. 66 of the Public Health Act, 1936, declaring that the said plans

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should be of no effect. The company thereupon submitted fresh plans for twenty-four houses and ten flats. The plans showed that each of the proposed buildings was to be connected by pipe or drain with the private sewer into which the drainage of the three houses and two flats, built in accordance with the plans approved in September, 1939, discharged. That private sewer discharged into septic tank No. 2, although the plans did not show it. The council, in pursuance of the powers conferred on it by s. 37 of the Act of 1936 (1), disapproved and rejected the said plans on the ground that the drainage proposals were unsatisfactory. The pipes or drains connecting the proposed houses and flats to the private sewer were admitted or proved to be satisfactory if constructed in accordance with the plans, but both the septic tanks discharged their contents into a stream which flowed through an open ditch. The stream flowed first past No. 1 tank, then past No. 2, and thence through fields past a dwelling-house, a farmhouse, and a jam factory, to the village of Histon. Above No. 1 tank the stream was clear and almost free from pollution. Immediately below it was polluted by sewage effluent and was further polluted below No. 2 tank. The smell from the stream was at time strong and noxious, annoyance was caused to persons in proximity to the stream, and the council considered that if more houses were built and the drainage discharged into the private sewer and thence into septic tank No. 2 the stream would become more polluted. No public sewerage disposal system is at present maintained by the council for the Thornton Estate.

The company applied to the court of summary jurisdiction for the petty sessional division of Cambridge for a determination of the question whether the provision for drainage purposes ought to be accepted by the council as satisfactory and on February 9, 1946, the court ordered that it ought to be accepted. Against this order the council appealed to the Appeal Committee of the court of quarter sessions for the county

(1) Public Health Act, 1936, s. 37, sub-s. 1: "Where plans of a building or of an extension of a building are, in accordance with building byelaws, deposited with a local authority, the authority shall reject the plans unless either the plans show that satisfactory provision will be made for the drainage of the building or of the extension, as

"the case may be, or the authority are satisfied that in the case of the particular building or extension they may properly dispense with any provision for drainage. "In this section the expression 'drainage' includes the conveyance, by means of a sink and any other necessary appliance, of refuse water and the conveyance of rain water from roofs."

of Cambridge, and on April 16 the appeal committee dismissed the appeal and confirmed the order. The committee was of opinion that the refusal of the council to approve the plans was not justified by the terms of s. 37, sub-s. 1, of the Public Health Act, 1936, in that the plans showed the pipes or drains to discharge into the private sewer which had been approved by the council on March 29, 1939, and that what happened thereafter was irrelevant.

The question submitted for the opinion of the court was whether the committee was right in holding that the notice of rejection of the plans was not justified by the terms of s. 37.

Stevenson K.C. and *Garth Moore* for the council. The substantial question is whether the justices were right in holding that in considering whether or not the provision for drainage of these buildings was satisfactory they were not entitled to consider any more than the actual drain which carried the sewage away from each building, using "drain" in the sense in which that word is used in the Public Health Act, viz., pipe taking sewage from one of several buildings within the same curtilage. The council contended that in considering whether the provision for drainage was satisfactory it was proper to take into account the sewer and septic tank; in other words, that it was proper to consider the destination of the sewage as distinct from the actual drains which carried the sewage away from the houses. The court of quarter sessions were completely wrong in placing upon the word "drainage" a construction corresponding to the definition of drain in the definition section of the Act. "Drain" is one part and "sewer" is another part, and in considering whether satisfactory provision is made for drainage the local authority must look not merely at the bit of pipe which leads from the dwelling to a common sewer but must consider the drainage as a whole, and if they think it is not satisfactory they have discretionary power under s. 37 to reject the plans. The definition section, s. 343, contains no definition of "drainage," but the definition of "sewer" ("all sewers and drains used for drainage") affords a definition of drainage. The quarter sessions appeals committee was undoubtedly impressed by the fact that in 1939 the local authority had approved the sewer in question. At that time the council had not had experience of the trouble caused by the discharge of effluent from No. 1 septic tank. It was in the light of that experience that in 1945 the council took advantage of s. 66 of the Act and rejected the plans in question.

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[*Meader v. West Cowes Local Board* (1) and *Button v. Tottenham U.D.C.* (2) referred to.]

Ryder Richardson and *Squibb* for the company. The question is whether the local authority is entitled to look beyond the deposited plans. Section 37 is open to one construction only viz., that the authority must look only at what the plans show. It would be quite wrong for this court to strain the construction of a section of an Act of Parliament intended to deal with matters before a house was built. The plans merely showed the scheme of drainage of each particular house, and that was all the council had to consider, but the council was trying to prevent the building of these houses by saying that the plans showed that the drainage was insufficient a long way off on its course to the sea. "Drainage" in s. 37, sub-s. 1, does not mean "system of drainage"; otherwise a local authority would be enabled to reject certain plans on the ground that the drains led into a sewer which connected with sewage disposal works some miles away which had become unsatisfactory. If any public nuisance existed or was created the council had its remedy under s. 50, sub-s. 1, of the Act.

LORD GODDARD C.J., having stated the facts, continued: The real question in this case is, I think, whether or not the expression "satisfactory provision will be made for the "drainage of the building," in s. 37, sub-s. 1, refers to the drains of the individual building or whether it refers to the system of drainage for this building or for buildings. It is further enacted in the same section, by sub-s. 3, that: "A proposed drain shall not be deemed to be a satisfactory "drain for the purposes of this section unless it is proposed to "be made as the local authority, or on appeal a court of "summary jurisdiction, may require, either to connect with a "sewer or to discharge into a cesspool or into some other place." I entirely agree that the mere fact that the drain may be shown to connect with the sewer, as it must if it is not to drain into a cesspool or other drain, does not mean of necessity that once it is shown to connect with the sewer it is satisfactory. That is not conclusive because, although the drain must have a terminus to which it leads, it does not at all follow, if it does lead to that terminus, namely, a sewer, that it must be satisfactory. On the other hand, Mr. *Ryder Richardson* contends that provided the plans show that the drain, that is to say the single private drain, to use a common expression, of the house, is a

(1) [1892] 3 Ch. 18, 28.

(2) (1898) 62 J. P. 423.

satisfactory drain, and both petty sessions and quarter sessions have held that it is, the local authority are not entitled under this section to reject the plans because something outside that drain itself, namely, the sewer, is not satisfactory. That is a matter on which my mind has fluctuated more than once in the course of the argument.

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I think it is rather a difficult case. One thing I bear in mind, sitting in this division, as in other courts of appeal, is that you ought not to interfere with the decision of the court below unless you are satisfied that that decision was wrong, and I am not satisfied that the decision of the court of quarter sessions was wrong, or that the court of petty sessions was wrong. I think the wording of s. 37, sub-s. 1, does indicate that all you ought to consider is the drainage of the particular building, and it is abundantly clear from other sections to which our attention has been called that, if the sewage from these various houses is not satisfactorily disposed of, if the sewer and the cesspool are not satisfactory, there is ample provision made in the Public Health Act by which the local authority can see that it is remedied. It may be that the local authority some day will perform their duty under s. 14 of the Act and provide for the laying of public sewers to take the sewage of the district. I dare say that at the present moment, owing to shortage of labour and the expense, and so forth, that may not be immediately possible; but I do not think, especially having regard to the words "of the building," that one can read the word "drainage" in s. 37, sub-s. 1, as meaning a system of drainage. At one time I thought you might be able to, by reason of the definition of "sewer" which is to be found in s. 343. It is not actually a definition, but it is in these words: "'Sewer' does not include a drain as defined in this section, but, save as aforesaid, includes all the sewers and drains used for the 'drainage of buildings.'" A drain is only for the drainage of one building. If there was any reference in s. 37, sub-s. 1, to sewers, I think one would have been able then to read the word "drainage" as meaning a combination of sewers and drains; but I do not think there are any words in s. 37, sub-s. 1, which make it admissible to read it in that way, and I should find it very difficult indeed, if we did read it in that way, to reject Mr. Ryder Richardson's argument that, if we are to read "drainage" as meaning a system of drainage, it would enable the local authority to reject certain proposed plans on the ground that the drains lead into a sewer which connects with sewage disposal works some miles away, which, on account of

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the growth of the neighbourhood or some other reason, are not satisfactory for the disposal of the sewage which may be conveyed there. It is true Mr. Melford Stevenson argued that we ought to assume that the local authority would act reasonably; but the argument of Mr. Ryder Richardson shows that, if one brings in considerations with regard to the sewers into which these drains are to drain, a variety of complications might arise which do not seem to be contemplated by the section.

I think, therefore, the court of quarter sessions were right in coming to the conclusion that the only matter they had to consider was the suitability of the particular drain which does connect with the sewer, and they are not concerned with what happens to the drainage of the houses once it passes into the sewer, or whether the sewer itself is satisfactory. If the sewer or parts of the sewer are not satisfactory, there are other means by which it can be dealt with. The appeal must be dismissed.

HUMPHREYS J. I am of the opinion that the matter is not a very easy one, the question being whether the words in s. 37, sub-s. 1, "satisfactory provision will be made for the drainage of the building," include satisfactory provision for the drainage of that and other houses, what may be described as the system of drainage. That question, I think, is a difficult one, but I am very much impressed by the argument of Mr. Ryder Richardson that this section must be looked at on the assumption that, as will happen in a great many cases, the person who puts forward plans of a building, including the proposed drainage of that building, will be a different person from the person who owns the sewer with which that drain will connect. If that took place and if such a case came into this court, it would be, I think, difficult for this court to hold that a person could not be said to have proposed a satisfactory drainage of the particular house to which alone the plan related, because the owner of a sewer, with which he was not concerned at all and over which he had no control, had allowed that sewer to get into an improper state, because the only requirement, as I read it, under s. 37 itself, with regard to the connexion between the private drain of the house and the sewer, is to be found in sub-s. 3, which merely requires that the drains of the house must connect with a sewer or discharge into a cesspool or some other place.

I also think it is worth remembering that the argument here is not that by approving the plan of this house, or of these

houses, the local authority is debarred from taking any steps it thinks right to prevent a nuisance. The argument is confined, and I think my judgment is confined, to the position that s. 37 is not the section under which the very laudable desires of the local authority should be carried out. I have no doubt that if and when the approval is given to the plans of these houses on the ground that the drainage of each house is in itself a satisfactory drainage, the local authority will still retain all its powers—and I would only, in passing, refer to ss. 39 and 50 of the Act, and perhaps to by-laws made under s. 61 of the Act—to prevent anything in the nature of a nuisance or anything which they think undesirable. So I come back to the narrow construction of s. 37 itself, being of opinion that where plans of a building are deposited the authorities shall reject the plans unless (and, I take it, should not reject the plans if) the plans show that satisfactory provision will be made for the drainage of that building, and I use the word “that” instead of the word “the,” which is to be found in the section. I agree with the judgment of my Lord for those reasons.

LEWIS J. In my opinion the appeals committee of quarter sessions was right in forming the view that, under s. 37, sub-s. 1, of the Public Health Act of 1936, the public authority, when plans are submitted to them, are only to look at the plans of the drains of the particular building and not go beyond that by considering the sewers or any other drainage arrangements. I agree with the judgments that have been delivered.

Question answered affirmatively.

Appeal dismissed.

Solicitors for Chesterton Council: *Waterhouse & Co., for Few & Kester, Cambridge.*

Solicitors for the company: *Blyth, Dutton & Co., for W. J. & J. G. Taylor, Newmarket.*

A. W. G.

THORNE v. SMITH.

C. A.

Landlord and tenant—Rent restriction—Order for possession obtained by misrepresentation—Application for compensation—Jurisdiction of court when order for possession made by consent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5, sub-s. 6.

1946
Nov. 18, 19 :
Dec. 10.

Scott,
Bucknill and
Somervell L.JJ.

The landlord of a dwelling-house within the Rent Restriction Acts,

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having represented to the tenant that he required the house for his own occupation, gave the tenant notice to quit and brought an action in the county court claiming possession under the Acts. The tenant, who was legally represented, attended at the court on the day fixed for the hearing, but did not contest the landlord's claim and an order for possession was made against him by consent. On possession being given the landlord did not enter into occupation, but put the property into the hands of estate agents for sale and it was sold with vacant possession. The tenant thereupon claimed compensation under s. 5, sub-s. 6, of the Act of 1920 on the ground that the order for possession "was obtained by misrepresentation." The county court judge held that he had no jurisdiction to grant compensation where the order had been made by consent :—

Held, that the order for possession had been obtained by misrepresentation within the meaning of the sub-section and that the tenant was entitled to the benefit of its provisions.

Held, also, that in the circumstances, although there was no contentious hearing in court, the county court judge had jurisdiction to make the order for possession.

APPEAL from Reading county court.

The plaintiff was the owner of a dwelling-house within the Rent Restriction Acts of which the defendant was the tenant. In 1945 the landlord informed the tenant that he required the house for his own occupation and in July of that year he served on the tenant a notice to quit on July 16. The tenant not having given up possession, the landlord on September 22, 1945, filed a claim for possession in the county court. The tenant disputed the claim on the ground that the premises were not reasonably required by the landlord for his own occupation and that, even if they were so required, greater hardship would fall on the tenant if the order were made than on the landlord if the order were refused.

On October 17, 1945, which was the date fixed for the hearing of the claim, both parties were legally represented at the court. The tenant did not then contest the landlord's claim and an order for possession was made by consent. The landlord had repeatedly stated to the tenant that he required the house for his own occupation and he repeated that statement in a letter subsequent to the order for possession. On March 2, 1946, the tenant vacated the house, but the landlord, after inspecting it, did not enter into occupation but put it into the hands of estate agents for sale with vacant possession. The house was sold on April 9, 1946.

On May 17, 1946, the tenant made an application to the county court judge under s. 5, sub-s. 6, of the Increase of Rent

and Mortgage Interest (Restrictions) Act, 1920 (1), claiming compensation from the landlord on the ground that the order for possession had been obtained by misrepresentation.

The county court judge found the facts in favour of the tenant and stated that he would have given judgment for the tenant for 180*l.* 15*s.* 4*d.* damages, but he held that in law he could not grant the application because the order for possession was made by consent. He further stated that, in his view, s. 5, sub-s. 6, of the Act of 1920 presupposed that there had been an investigation of the claim by the court and an order made after such investigation and that the misrepresentation referred to in the sub-section was misrepresentation to the court investigating the claim.

The tenant appealed.

R. G. Micklethwait and *Olson* for the tenant. There is nothing in the wording of sub-s. 6 which precludes it from applying where the order for possession has been obtained by consent. The words "order or judgment" ordinarily include a consent order. In *Rossiter v. Langley* (2) it was held that the court had power under s. 5, sub-s. 2, of the same Act to vary a consent order and there is no reason why the same principle should not apply to sub-s. 6. The words "misrepresentation" and "concealment" are very wide and cover more than the giving of false evidence. They must have been intended to include any misrepresentation or concealment of facts which result in the court making an order. [Counsel also referred to *Wyatt v. Palmer* (3) and *Shaw v. Hertfordshire County Council* (4).]

Havers K.C., *E. A. Jessel* and *Asher* for the landlord. A mere order by consent is not sufficient to give the court jurisdiction to act under sub-s. 6. In effect it is the same as an agreement between the parties which does not affect the question of the

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5, sub-s. 6: "Where a landlord has obtained an order or judgment for possession or ejectment under this section on the ground that he requires a dwelling-house for his own occupation, and it is subsequently made to appear to the court that the order or judgment was obtained by misrepresentation or the concealment of material facts, the court may order the landlord to pay to the former tenant such sum as appears sufficient as compensation for damage or loss sustained by that tenant as the result of the order or judgment."

(2) [1925] 1 K. B. 741.

(3) [1899] 2 Q. B. 106.

(4) [1899] 2 Q. B. 282.

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court's jurisdiction under the Rent Restriction Acts: see *Barton v. Fincham* (1). In that case, Atkin L.J., said (2): "Parties cannot by agreement give the courts jurisdiction which the legislature has enacted they are not to have." Here the court never considered whether the conditions of the Act giving the court jurisdiction to make the order had been satisfied. There was not even anything in the particulars of claim to indicate on what ground the landlord was claiming possession. The court must, before making an order, investigate the circumstances of the case and exercise discretion: see r. 18 of the Increase of Rent (Restrictions) Rules, 1920, and *Salter v. Lask* (3). If there is no evidence before the court at all, then the court has no jurisdiction to make an order for possession. [Counsel also referred to *Brown v. Draper* (4).]

"Misrepresentation" in s. 5, sub-s. 6, of the Act of 1920 must mean misrepresentation made to the court. That view is borne out by r. 1 (e) of the 1920 Rules, which provides that an application under the Act for compensation under s. 5, sub-s. 6, may be made to the court in which the order or judgment complained of was obtained. The very summary procedure provided by s. 5, sub-s. 6, can only have been intended to apply where the misrepresentation was made to the court, since the court would already have had the matter fully before it. In the case of misrepresentation made by a landlord to a tenant there should be full pleadings.

Olson replied.

Cur. adv. vult.

December 10. The following judgments were read.

SCOTT L.J. This appeal by a tenant depends solely on the correct interpretation of s. 5, sub-s. 6, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. On the hearing of the tenant's claim under that sub-section the county court judge found every fact in his favour, refused to believe the landlord's evidence, and would have given judgment in favour of the tenant for 180*l.* 15*s.* 4*d.* damages, but for a view he took of the interpretation of the sub-section. He thought it predicated an order made against the tenant after a contentious hearing in court on the merits, in which the court should come to the conclusion that the defendant had been guilty of mis-

(1) [1921] 2 K. B. 291.

(2) *Ibid.* 299.

(3) [1924] 1 K. B. 754.

(4) [1944] K. B. 309.

representation or concealment in and to the court, and that a consent order for possession was outside the jurisdiction conferred by sub-s. 6. He therefore reluctantly gave judgment for the landlord, then defendant. In my opinion he was wrong. As I read the sub-section, the tenant was entitled to the benefit of it. As an aid to construction it is well to consider what the rights of the tenant would have been apart from the sub-section. In essence, the provisions of the Act of 1933 contained in s. 3, sub-s. 1 (a), and the schedule thereto allowing recovery of possession by a landlord without proof of "suitable alternative native accommodation," if he wanted the house for his own occupation, had been present in the Act of 1920, and so far as they throw light on s. 5, sub-s. 6, of that Act they must be borne in mind.

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If the misrepresentation was fraudulent, the tenant, who had submitted to a consent judgment because of the landlord's representation that he wanted the house for his own occupation, could have brought a common law action for damages for deceit and the consent judgment would have been no defence. In addition, he would have been entitled to have that judgment set aside by bringing an action for the purpose; and the two causes of action could have been included in the one writ.

In the second place, even without an allegation and proof of fraud, if the judgment had been obtained by innocent misrepresentation, the tenant could in equity have had the consent judgment set aside, as in the case of any contract obtained by misrepresentation, and since the Judicature Acts also in a common law action: see *Ainsworth v. Wilding* (1) and *Wilding v. Sanderson* (2), where Lindley L.J. said: "It was conceded, "and in my opinion it is clear, that the order of November 23, "1894, being a consent order based on and intended to carry "out an agreement come to between the parties, ought to be "treated as an agreement which could be properly set aside "on any ground on which an agreement in the terms of the "order could be set aside. Mistake is one of such grounds." Without proof of fraud, no action for damages would lie (*Derry v. Peek* (3)); but rescission of the contract could always be obtained from a court of equity. "Concealment of material "facts" is a phrase borrowed from the law of contract in the case of agreements of "utmost good faith" like insurance. There the common law imposes on the person seeking insurance

(1) [1896] 1 Ch. 673, 679, 680. (3) (1889) 14 App. Cas. 337.

(2) [1897] 2 Ch. 534, 550.

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the duty of disclosing to the underwriters all facts within his knowledge, which are material to the underwriter's estimate of the risk. If he fails to do so, the underwriter on proof of the fact of non-disclosure escapes from the obligations of the policy, and the court will, if asked, grant rescission.

That being the state of the law—both common law and equity—apart from the sub-section, it is obvious that Parliament was conferring two new substantive rights to money compensation: (1.) for mere misrepresentation, that is, without proof by the claimant of any fraud; and (2.) for non-disclosure of material facts; with the correlative result that the landlord obtaining a judgment for possession by either means would be committing a statutory breach of duty. The second new right of action created by Parliament, in legislation interfering with freedom of contract for the purpose of protecting tenants, has particular significance, for it treats the landlord's claim to recover possession as analogous to the claim by the assured against his insurer, and therefore as one calling for "the utmost good faith" on the part of the landlord.

It was argued for the landlord below and before us—and decided below—that the order for possession was not "obtained" by the misrepresentation, although it was the misrepresentation by the landlord which made the tenant consent to judgment. I cannot accede to any such contention. The word "obtain" raises the issue of cause and effect; and the mere introduction of the tenant's consensual submission to what he foresaw would be the inevitable result in the judge's mind of the fact (as he thought) that the landlord bona fide wanted the house for his own occupation, does not sever the causal nexus between the landlord's misrepresentation and the court's order. The order made was, in my opinion, plainly caused by the misrepresentation and it was therefore so obtained within the meaning of the section; for there was no "new cause intervening."

A refinement of the main argument was suggested in the further submission that the misrepresentation could not be said to have been made to the court by any oral or documentary evidence. That refinement is in my view meaningless, and is not the sort of argument which Parliament intended to be applied in county courts for the solution of disputes between landlords and tenants. The landlord "obtained the order by "misrepresentation," within the meaning of the sub-section. The appeal must be allowed with costs here and below, and

judgment entered for the applicant for 180*l.* 15*s.* 4*d.* I think that the conduct of the landlord makes it right that he should pay the costs below, taxed on Scale "C."

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BUCKNILL L.J. It seems to me that the view of the county court judge as to the interpretation to put upon s. 5, sub-s. 6, is not warranted by the words of the section. The landlord had clearly obtained an order for possession, or what purported to be an order, under the Act. It is true that in his claim he did not set out as the basis of his claim that he required the house for his own residence, but he obtained the order by consent of the tenant because he told the tenant that he intended to reside there.

Mr. Havers, for the landlord, took the point that the landlord had not in fact obtained an order for possession such as is referred to in the section, because the judge had not inquired into the matter and that therefore the order for possession was itself invalid. Mr. Havers relied upon *Barton v. Fincham* (1) decided in the Court of Appeal. In that case the tenant of a house within the Rent Restriction Acts agreed with the landlord to give up possession at Michaelmas, 1920, in consideration of the payment of 20*l.* by the landlord to him. When Michaelmas arrived the tenant refused to give up possession of the house or the 20*l.* The landlord then brought an action under the Rent Restriction Acts to recover possession of the house, but failed to prove any of the statutory conditions set out in the Acts which would justify the court in making the order. The county court judge made an order for possession. The two judges of the Divisional Court differed as to whether the county court judge could make such an order, but the Court of Appeal decided that he could not.

The case therefore differs very materially in its facts from the case before the court in that in the present case the tenant submitted to the order being made, whereas in *Fincham's* case (1) he ultimately refused to do so. There are passages in the judgments in *Fincham's* case (1) which to some extent support Mr. Havers' argument, and there are also passages relied on by the other side. Thus Bankes L.J. said (2): "In my opinion s. 5 is an instance of a case where the legislature has in clear and unmistakeable language restricted the jurisdiction of the court, and where no agreement between the parties can give the court a jurisdiction which the legis-

(1) [1921] 2 K. B. 291.

(2) *Ibid.* 296.

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"lature has said it is not to exercise." Atkin L.J. said (1) :
 "The section appears to me to limit definitely the jurisdiction
 "of the courts in making ejectment orders in the case of
 "premises to which the Act applies. Parties cannot by
 "agreement give the courts jurisdiction which the legislature
 "has enacted they are not to have. If the parties before the
 "court admit that one of the events has happened which
 "give the court jurisdiction, and there is no reason to doubt the
 "bona fides of the admission, the court is under no obligation
 "to make further inquiry as to the question of fact ; but apart
 "from such an admission the court cannot give effect to an
 "agreement, whether by way of compromise or otherwise,
 "inconsistent with the provisions of the Act."

Is, then, an agreement by consent such as was made in this case such an agreement as Atkin L.J. had in his mind ? It seems to me doubtful whether the court could make an order for possession under the Act if, for instance, the tenant stated in court that he consented to quit and to an order for possession, solely because the landlord had promised to pay him 20*l.* The question is difficult because of the remarks by Scrutton L.J. in *Fincham's* case (2). There Scrutton L.J. said : "It was urged that the effect of our decision would be to prevent agreements in court. If the tenant is willing to go out, I do not see why any order is wanted ; let him go ; but as at present advised I do not see any reason why the judge on being satisfied that a tenant is then ready to go out (not that he was once willing but has changed his mind) should not make an order for possession."

But in the present case it is, I think, reasonably clear that the tenant in effect agreed to the order because at the time when the landlord asked the court to make the order the landlord by his own statements had satisfied the tenant that he intended to occupy the house himself and he, the tenant, could not hope successfully to resist the claim. If the tenant had stated this expressly in court the judge would surely have had jurisdiction to make the order on that ground. I think in the events which happened here, the defendant being legally represented, the judge was entitled to make the order on the assumption that this was the true position.

Before making an order for possession the judge is under a duty to satisfy himself as to the truth if there be a dispute between landlord and tenant, but if the tenant in effect agrees that the landlord has a good claim to an order under the Acts,

(1) [1921] 2 K. B. 299.

(2) Ibid. 298.

I think the judge has jurisdiction to make the order for possession under the Act without further inquiry. For these reasons the appeal, in my view, should be allowed.

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SOMERVELL L.J. (read by Bucknill L.J.). I agree, and only wish to add some observations on two points. Mr. Havers drew our attention to r. 18 of the rules made under the Act of 1920, which reads as follows: "Where proceedings are taken in the county court for the recovery of rent of any premises to which the Act applies, or of interest on a mortgage to which the Act applies, or for the recovery of possession of any premises to which the Act applies, or for the ejectment of a tenant from any such premises, the court shall, before making an order for the recovery of such rent or interest, or for the recovery of possession or ejectment, satisfy itself that such order may properly be made, regard being had to the provisions of the Act." That rule was considered and applied in *Salter v. Lask* (1). Nothing in the decision that we are giving in any way, as it seems to me, diminishes the scope of that rule. We are deciding that on what happened in this case, the defendant being, as he was, legally represented, the county court judge was rightly "satisfied" that the order could properly be made.

The other point arises from the use of the word "consent" as applied to the order made herein. The expression "a consent order" may suggest some compromise or arrangement which might be inconsistent with the provisions of the Acts. When the defendant is agreeing to submit to judgment because he is satisfied that the plaintiff can establish his right to an order under the Acts, it might be advisable to avoid the use of the word "consent," which may have a wider meaning and cover cases where the "consent" was the result of an arrangement which could not properly be made the basis of an order.

Appeal allowed.

Solicitors for the tenant: *Mills & Morley, for Ratcliffe & Duce, Reading.*

Solicitors for the landlord: *Hancock & Scott, for B. Bunker & Son, Hove.*

(1) [1924] 1 K. B. 754.

H. A. P.

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MURGATROYD *v.* TRESARDEN.

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Nov. 13, 14,
22.Scott,
Bucknill and
Somervell L.JJ.

Landlord and tenant—House let to defendant containing two self-contained flats—Upper flat sublet to plaintiff, defendant residing in lower—Plaintiff ejected but allowed to leave furniture in upper flat—Defendant receives notice to quit the house—Plaintiff becomes freeholder and landlord of house—Claim to possession of upper flat.

The defendant became tenant of a house in London, the rateable value of which on the appropriate day did not exceed 100*l.*, containing two self-contained flats with a common entrance and a common staircase. He resided in the lower flat himself and sublet the upper flat to the plaintiff. Subsequently the defendant obtained possession of the upper flat under an order of the court, the plaintiff being ejected but leaving his furniture there. The defendant then agreed that the plaintiff's furniture might remain in the upper flat, whilst he sought other accommodation for it, paying the defendant 2*s.* a day for this right. Notice to quit the house was given to the defendant but he remained in possession, claiming to be a statutory tenant. The plaintiff having become the freeholder and landlord of the whole house brought proceedings claiming possession thereof or, alternatively, of the upper flat. At the hearing, no evidence was given that the house had ever been occupied as a single dwelling-house though presumably it was built originally for that occupation and no evidence was given by the defendant that he intended himself to reside in the upper flat. An order was made granting the plaintiff possession of the upper flat :—

Held, affirming the order, that the position was the same in law as if the two flats had been two adjacent dwelling-houses. The defendant not residing in the upper flat and there being no evidence that he intended to do so, the upper flat was not protected by the Rent Restriction Acts.

Skinner v. Geary [1931] 2 K. B. 546, applied.

Quaere. Would *Skinner v. Geary* apply, if on similar facts the one part of the house had not been structurally divided off from the other and a part of the house had been temporarily sublet?

APPEAL from Bow county court.

In the county court the parties agreed the facts to be those stated in the pleadings and called no evidence. From the pleadings it appeared that the defendant in 1941 became a tenant of No. 197, Milton Avenue, London, the rateable value of which did not exceed 100*l.* on the "appropriate day," at a weekly rent of 30*s.* These premises consisted of two "floors" or "flats" as they were described in the pleadings and the Court of Appeal found that the natural inference from the admitted facts was as stated in the judge's note,

that at all material times the premises consisted of two self-contained flats with a common entrance and a common staircase. On obtaining the tenancy, the defendant granted a sub-tenancy of the upper flat to the plaintiff at a weekly rent of 14s. The defendant, with his family, from the beginning of the tenancy resided in the lower flat and still continued in occupation thereof. On July 12, 1945, the defendant obtained an order for possession of the upper flat and pursuant to the order, the plaintiff was ejected therefrom on September 21, 1945, but left his furniture there. On September 24, 1945, the parties agreed that the plaintiff's furniture might remain in the upper flat, pending the finding by the plaintiff of accommodation for it, the plaintiff paying the sum of 2s. per day for this right. On February 21, 1946, the landlord of No. 197, Milton Avenue, gave the defendant notice to quit and, on the expiration of the notice to quit, the defendant's tenancy was determined and thereafter the defendant remained in possession of 197, Milton Avenue, claiming to be a statutory tenant. On April 25, 1946, the defendant, who had repeatedly asked the plaintiff to remove his furniture from the upper flat, gave him notice to end the storage agreement.

On April 30, 1946, the plaintiff became the freeholder and landlord of No. 197, Milton Avenue, and on May 6, 1946, brought proceedings in the Bow county court against the defendant claiming possession of No. 197, Milton Avenue or, in the alternative, of the upper flat therein. The county court judge made an order granting the plaintiff possession of the upper flat. The defendant appealed.

Charles Burke (*Bassett* was with him) for defendant. The decision of the county court judge was wrong. The defendant obtained a tenancy of 197, Milton Avenue at a weekly rent of 30s., then subletting the upper portion of the dwelling-house to the plaintiff at 14s. a week. The plaintiff was ejected from the upper part of the house and from the moment of his ejection the defendant was in law in possession of the whole house for residential purposes. There was only one letting to the defendant, i.e., a letting of the whole house and a sub-tenancy could not change that position as between the landlord and the defendant who only by reason of the plaintiff's furniture was unable to occupy the upper flat. No doubt, had these two "floors" or "flats" as they were described in the pleadings been adjacent houses the principle in

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Skinner v. Geary (1) would have applied ; but that case is not applicable here where part of a dwelling-house has been sub-let and the two floors or flats were part of one dwelling-house let to the defendant. The defendant was never a " non-occupying " tenant " in the words of Scrutton L.J. in *Skinner v. Geary* (2).

Rees-Davies for plaintiff. These were two separate self-contained flats and the position is the same as if under the original letting the defendant had become tenant of two adjacent dwelling-houses. The defendant had never lived in the upper flat and there was no evidence that he ever proposed to do so. The upper flat was taken for the purpose of letting to another than the defendant and was so let. That being so, the county court judge found as in *Skinner v. Geary* (1), that " the purpose of the occupation was not to preserve the " house as a residence for the defendant " and by virtue of that decision, this upper flat was not subject to the protection of the Rent Restriction Acts. The principle of the Acts is to protect a tenant in residence, a tenant whose home the dwelling-house is.

Secondly, the defendant gave the plaintiff a licence to use the upper flat for the purpose of storing furniture. On that ground also the upper flat is severable from the lower flat, being used for business purposes. Control under the Acts of business premises ceased on June 24, 1921. According to Greer J. in *Gidden v. Mills* (3) where premises are let without any prohibition as to user, so that they may be used in any lawful way, the nature of the actual user at the time the claim to possession is made must determine whether the premises fall within the Rent Restriction Acts. See also *Phillips v. Hallahan* (4), *Haskins v. Lewis* (5) and *Gee v. Hazleton* (6).

Lastly the plaintiff was entitled to claim possession of No. 197, Milton Avenue—the whole house, offering to the defendant the lower flat as alternative accommodation. *Thompson v. Rolls* (7). This point was not argued in the county court.

Charles Burke in reply. The last argument for the plaintiff cannot be raised at this stage. The attention of the county court judge was not directed to the observations of du Parcq L.J. in *Mouser v. Major* (8) where he said : " In the great

(1) [1931] 2 K. B. 546.

(2) Ibid. 561.

(3) [1925] 2 K. B. 713, 727.

(4) [1925] 1 K. B. 756.

(5) [1931] 2 K. B. 1.

(6) [1932] 1 K. B. 179.

(7) [1926] 2 K. B. 426.

(8) [1941] 1 K. B. 477.

“majority of cases of this sort, it is most desirable that evidence should be heard. It is not satisfactory in a county court, where facts have to be found, that statements and admissions should be made and the case heard as if on a case stated” (1).

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Nov. 22. SCOTT L.J. I will ask Somervell L.J. to read his judgment first.

SOMERVELL L.J. The county court judge has given us no note of the reasons for his decision. In these circumstances, it is convenient to consider the grounds on which the plaintiff's counsel, Mr. Rees-Davies, sought to uphold the judge's order and the defendant's counter argument. Mr. Rees-Davies submitted, in the first place, that these two self-contained flats were, for the purposes of the Rent Restriction Acts, to be treated as separate dwelling-houses. The position was the same as if the defendant, under the original lease, had become tenant of two adjacent houses. On this view, he relied on *Skinner v. Geary* (2). In that case the defendant was the lessee of a house which came within the Acts but he did not himself live in it. Notice to quit was served. At the time of the proceedings the defendant was letting his sister live in the house, but the county court judge found that the “purpose of that occupation was not to preserve the house as a residence for the defendant.” The Court of Appeal, affirming the county court judge, held that the plaintiff was entitled to possession. The majority of the court laid down that, the fundamental principle of the Acts being to protect a tenant who is residing in a house, a tenant to be entitled to the protection of the Acts must be in personal or actual occupation, or intending to return to it. If, in the present case, the defendant had given evidence and established that when he ejected the plaintiff he intended to occupy both flats himself and had only been prevented from doing so by the presence of the plaintiff's furniture, which he agreed to store, different issues would have arisen. He gave no such evidence, and I think the county court judge was entitled to draw the inference that, never having lived in the upper flat, the defendant had no intention of doing so. The question is whether, as Mr. Rees-Davies contends, the principle of *Skinner v. Geary* (2) applies to two self-contained flats in one house. Mr. Burke, I think, agreed that if one substituted two adjacent houses for the

(1) [1941] 1 K. B. 484.

(2) [1931] 2 K. B. 546.

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two flats the principle would, on the other facts as agreed here, apply. He submitted, however, it should not apply to premises such as these. I feel myself in some difficulty owing to the paucity of evidence as to the structure of this house. If a part of a house was temporarily sublet, there being no real dividing off of one part from another, I am, at any rate, not prepared to lay down that the principle of *Skinner v. Geary* (1) would be applicable. The defendant here has, however, been content to let the case proceed on the basis that this house consisted of two separate flats. There is no evidence that it had ever been occupied as a single dwelling-house, though, presumably, it was originally so built. The natural meaning of the word "flat" is, I think, a separate self-contained dwelling, and I can see no reason why the principle, in particular as laid down by Scrutton L.J. in *Skinner v. Geary* (1) does not apply. The defendant has never resided in the upper flat, he has no intention of residing there, and he cannot, therefore, claim the protection of the Acts as against the landlord.

On this view it is unnecessary to consider Mr. Rees-Davies's second and third arguments. He submitted that the agreement for storing the furniture was a business user of the premises and this user took them out of the protection of the Acts. I would not have been prepared to accept the view that the storage of the furniture for the plaintiff in the circumstances as set out was a business user. He contended further that he could claim possession of the whole house, offering the defendant the lower flat as alternative accommodation, and he relied on *Thompson v. Rolls* (2). This was admittedly not argued below, and, though it may be difficult to see the defendant's answer on the basis of *Thompson v. Rolls* (2) I do not think it is necessary to consider whether it could properly be raised at this stage. For these reasons, the appeal will be dismissed.

SCOTT L.J. I have had the advantage of reading the judgment of Somervell L.J. and agree with it. The parties having agreed the facts as stated in the pleadings and called no evidence, this court is precluded from going outside them. Their essential feature is that the "premises" consisted of two dwelling-houses, whether they be given the name of "floors" or "flats"—both of which names appear in the pleadings. After losing possession of the upper flat, the

(1) [1931] 2 K. B. 546.

(2) [1926] 2 K. B. 426.

plaintiff bought the fee simple, that is, the reversion upon the weekly tenancy of the defendant, which remained what it always had been, namely, a tenancy of both dwelling-houses. As the defendant was in residence in the lower one, his occupation was protected, unless the landlord could satisfy the learned judge that he fulfilled one or other of the statutory conditions attaching to an order for possession of it. This he failed to do. But the defendant could not claim that statutory protection in respect of his tenancy of the upper flat, because he was not residing in it. It seems to me to follow necessarily that the learned judge's order was right, and that the appeal must be dismissed.

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BUCKNILL L.J. I agree.

*Appeal dismissed.*Solicitors for defendant: *Kenneth Duthie & Co.*Solicitors for plaintiff: *Daybell, Watts-Jones & Co.*

C. G. M.

REX v. JUSTICES OF BODMIN. *Ex parte* McEWEN.

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Dec. 20.

Justices—Criminal law—Stabbing with bayonet—Charge reduced from “wounding with intent to do grievous bodily harm” to one of “unlawful wounding”—Plea of “Guilty” to the misdemeanor—Summary conviction—Jurisdiction of justices—Witness to character interviewed by justices, before sentence pronounced, in their room—Neither accused nor his advisers present—Motion for order of certiorari—Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86), s. 24, sub-s. 1.

Lord Goddard
C.J.,
Humphreys and
Lewis JJ.

The accused, a soldier, was alleged, during a barrack room quarrel, to have stabbed another soldier in the back with a bayonet, the injury being of so serious a nature that the doctors were of opinion that the injured man could not survive, and steps were taken to get his evidence by deposition. He, however, recovered, and at the trial before a court of summary jurisdiction, where the accused was charged under the Offences Against the Person Act, 1861, with “wounding with intent to do grievous bodily harm,” the justices, at the request of both the prosecution and the defence, allowed the charge to be reduced to one of “unlawful wounding,” and proceeded to deal with the case summarily. The accused pleaded guilty to the misdemeanor and the justices retired to their room to consider their sentence. During the proceedings in court an officer of the accused's unit had been called as a witness as to character, and after stating that the accused was a good worker

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when not under the influence of drink, and had given no trouble since the stabbing affair, he had added : " I could say a lot more " but I think I had better not." The justices after retiring to their room sent for this officer and interviewed him, without either the accused or his legal advisers being present. On returning into court they sentenced the accused to six months imprisonment, the longest term permissible under s. 24, sub-s. 1, of the Criminal Justices Act, 1925, under which they assumed jurisdiction to deal with the case summarily. On a motion on behalf of the accused for an order of certiorari to quash the conviction :—

Held, that the conviction must be quashed, for the accused did not and could not know what had been said at the interview and therefore justice was not seen to be done.

Observations by Lord Goddard C.J. on the intention of s. 24, sub-s. 1, of the Criminal Justice Act, 1925, and the jurisdiction of justices thereunder.

MOTION for order of certiorari to bring up and quash conviction.

On October 9, 1946, the accused John McEwen, a soldier, was charged before the petty sessions for the borough of Bodmin with wounding Arthur Millington with intent to do grievous bodily harm, contrary to the Offences Against the Person Act, 1861. The facts were that on the night in question the accused and another soldier returned from the town of Bodmin to the depot of the Duke of Cornwall's Light Infantry at Bodmin Barracks after lights out. They had apparently been drinking, and when they entered the room in which Millington and others were sleeping the accused insisted on turning the lights on. The occupants protested and asked for the lights to be turned off, warning the accused that otherwise there would be trouble. The accused and his companion began to quarrel with the others and particularly with Millington, who was kicked and caught by the testicles. Ultimately the accused went out and returned with his bayonet. Most of the men had run from the room in the interval, leaving only Millington and another soldier, who tried to take the weapon from the accused. During the struggle that ensued Millington received from the accused a stab in the back with the bayonet. Millington was removed to the Royal Cornwall Infirmary at Truro, and later the justices of Truro granted an application for his evidence to be taken by deposition, pursuant to s. 6 of the Criminal Law (Amendment) Act, 1867, on the ground, which was supported by medical certificate, that he was not expected to recover.

In fact the injured man did recover, and at the trial both

the prosecution and the defence asked the justices to deal with the case summarily as one of unlawful wounding. The justices consented and the accused pleaded "Guilty." During the proceedings in court an officer of the accused's unit was called as a witness as to character, and said: "The accused is a very good worker when he is not under the influence of drink. Since this stabbing affair we have not had any trouble with him. I could say a lot more but I think I had better not." The justices then retired to their room to consider their sentence and shortly afterwards summoned the officer to an interview at which neither the accused nor his legal representatives were present. On returning into court they sentenced the accused to six months' imprisonment.

The accused moved for an order of certiorari.

C. Besley for the accused.

Astell Burt for the justices. Nothing improper took place in the justices' private room. The justices merely desired to know what effect conviction and sentence would have on the accused's service in the army. The officer had merely replied that the army would still be interested in him.

[LORD GODDARD C.J. But the accused would not know what had taken place.]

It is, of course, to be regretted that the mistake was made but it is submitted that in the circumstances an order of certiorari should not be granted.

[LORD GODDARD C.J. Have the justices jurisdiction to try a case of unlawful wounding?]

Yes, under the Criminal Justice Act, 1925.

H. E. Park for the police (prosecutors) took no part in the argument.

LORD GODDARD C.J. This is an application for an order of certiorari to bring up and quash a conviction of one John McEwen who, on October 9, 1946, was charged before the justices for the Petty Sessional Division of the borough of Bodmin with wounding one Arthur Millington with intent to do grievous bodily harm, contrary to the Offences Against the Person Act, 1861—an offence which is punishable with penal servitude for life. Apparently before the facts were gone into, for some reason, both the prosecution and the defence asked the justices to deal with the case as one of unlawful wounding. [His Lordship stated the facts, of which he said, the justices

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were informed when they apparently consented to deal with the case. He continued:] Fortunately, he [Millington] did recover, and, I suppose, because he did recover the justices considered that it was a proper case in which to allow the charge to be reduced to one of misdemeanor, unlawful wounding, and consented to deal summarily with the case. I will read s. 24 (1.) of the Criminal Justice Act, 1925, under which they assumed jurisdiction: "Where a person who is an adult is "charged before a court of summary jurisdiction with an indictable offence, being one of the offences specified in the "second schedule to this Act"—and the offence of wounding with intent is not one of such offences, although unlawful wounding is—"the court, if it thinks it expedient so to do, "having regard to any representation made in the presence of "the accused by or on behalf of the prosecutor, the character "and antecedents of the accused, the nature of the offence"—mark these next words—"the absence of circumstances that "would render the offence one of a grave or serious character "and all the other circumstances of the case (including the "adequacy of the punishment which a court of summary "jurisdiction has power to inflict), and if the accused, when "informed by the court of his right to be tried by a jury, "consents to be dealt with summarily, may, subject to the "provisions of this section, deal summarily with the offence." Of course, the justices would have had no jurisdiction at all to proceed under that section if the charge had been made one of wounding with intent. So the first thing they do, when they are asked by the prosecution and the defence to do it, is to reduce the offence to one of unlawful wounding and then consent to deal with it summarily.

Here is a case in which a man's life has been seriously imperilled and if he had died, this applicant, the accused, would have been charged with murder. It was never intended that where a man, whether under the influence of drink or not, takes a bayonet and stabs a fellow soldier in the back, with the consequences which are disclosed in this case, justices should deal with such a case by reason of that section. For justices to exercise jurisdiction under that section by treating a case of this sort as nothing much more than common assault is a most extraordinary state of affairs. Justices should remember that they have to deal with matters of this sort judicially, and, although they must take into account what the prosecution and the defence say with regard to whether or not it is a proper case

for the charge to be reduced, they are not bound to assent to dealing with the case summarily because the prosecution want to get the matter dealt with there and then, without the necessity of going to the assizes, where this case undoubtedly should have been sent. It is only due to the fact that Millington recovered that the accused was not charged with murder. That the justices should deal with a case of this sort under the provisions of the section to which I have referred seems to be a most unfortunate thing to have happened. It is not, however, a ground for certiorari. The justices having so acted, this court cannot interfere. We can only express grave disapproval of the fact of the justices having acted in this way.

The ground on which certiorari can, in this case, be granted is this : An officer of the accused's unit was present in court and was asked to give the man a character. He did so and it was not a bad character. He added that there was a lot more that he could say but he would not say it. This was the character that he gave : " The accused is a very good worker when he is " not under the influence of drink. Since this stabbing affair " we have not had any trouble with him. I could say a lot " more but I think I had better not." The justices then retired to consider their sentence, and, having retired, they sent for this officer, who had just said that he could say a good deal more but thought he had better not, and they interviewed him in their room. Whether the officer stayed in the room for one minute, or whether he stayed there for five minutes, does not matter. They were interviewing a person who had been in court in connexion with the case and had given the justices information in connexion with it ; they were interviewing him in their room in the absence of the accused or his advisers. That is a matter which cannot possibly be justified. I am not suggesting for one moment that the justices had any sinister or improper motive in acting as they did. It may be that they sent for this officer in the interests of the accused ; it may be that the information which the officer gave was in the interests of the accused. That does not matter. Time and again this court has said that justice must not only be done but must manifestly be seen to be done. If justices interview a witness in the absence of the accused, justice is not seen to be done, because the accused does not and cannot know what was said. Although I am not suggesting that the justices had any improper motive, the consequence of this unfortunate incident is that this conviction must be quashed. This man ought never to have been tried by the

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justices ; he ought to have been sent to the assizes. He received a sentence of six months imprisonment. This court must, under these circumstances, quash the conviction, and costs must be awarded against the justices. It was entirely their action which led to this application, which has succeeded. No costs will be awarded against the prosecutor who has not opposed the application.

HUMPHREYS J. So far as I am concerned, the judgment which has just been delivered is the judgment of the court.

LEWIS J. I agree.

Conviction quashed. Order for costs against justices.

Solicitors for accused : *Robbins, Olivey & Lake, for Thrall, Llewellyn & Spooner, Truro.*

Solicitors for justices and police : *Barlow, Lyde & Gilbert, for Stephens & Scown, St. Austell.*

A. W. G.

1946
 Dec. 12.

READ v. DONOVAN.

Lord Goddard
 C.J.,
 Humphreys and
 Lewis JJ.

Firearms—Necessity for firearm certificate—"Lethal weapon"—Signal pistol—Firearms Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 12), s. 1, sub-s. 2, s. 32, sub-s. 1.

A lethal weapon within the meaning of the Firearms Act, 1937, is a weapon capable of causing injury, the intention of the manufacturer or designer being immaterial.

Where, therefore, a person had in his possession a signal pistol capable of killing at short range, but did not hold a firearm certificate in respect of it :—

Held, that the signal pistol was a firearm within the meaning of the Act and that its possessor was guilty of an offence.

CASE STATED by a metropolitan magistrate.

An information was preferred by the appellant before a metropolitan magistrate charging the respondent with having acquired a firearm to which Part I. of the Firearms Act, 1937, applied, without holding a firearm certificate in force at the time, contrary to s. 1, sub-s. 2 (a), of that Act.

At the hearing the following facts were proved or admitted.

The implement which the respondent had in his possession was a double-barrelled signal pistol of German make, firing a cartridge with explosive ballistite and containing a phosphorous and magnesium flare. There was a small propelling charge. It was capable of killing at short range and might be fatal up to twenty feet. It might inflict a more serious wound than a heavy revolver, as the flare might penetrate and continue burning in the wound. That type of instrument was not designed as a weapon, but it had been used as such. During the past war it was in fact used against enemy troops with fatal results.

The magistrate was of opinion that the expression "lethal weapon" in the Firearms Act, 1937, meant an implement which was designed to kill or inflict injury as distinct from an implement which, being misused, was capable of killing or inflicting injury, and he accordingly dismissed the information, but, at the request of the appellant, he stated this case for the opinion of the High Court.

Vernon Gattie for the appellant.

The respondent did not appear and was not represented.

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LORD GODDARD C.J. The question in this case is whether the article which the respondent had in his possession is a firearm. The matter seems to me beyond doubt. It sufficiently appears from the magistrate's findings that the article is a pistol designed as a signalling apparatus and it is significant that signalling apparatus is specifically dealt with in s. 4, sub-s. 6, of the Act. Section 4 deals with exemptions from the necessity of having a firearm certificate and one of the exemptions is a signalling apparatus on board an aircraft or on an airfield as part of the equipment of the aircraft or airfield. It is obvious, therefore, that the framers of the Act intended that a signalling apparatus should be within the Act, since it is exempted if it is used merely in an aircraft or on an airfield. The definition of "firearm" in s. 32, sub-s. 1, of the Act is "any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged." If a weapon is a lethal weapon, which means a weapon capable of causing injury, and if such a weapon is barrelled and a shot, bullet or other missile can be discharged from it, it is a firearm. In the present case the article is clearly such a weapon. The intention of the manufacturer or designer of the weapon is

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immaterial: the question simply is whether the weapon is capable of inflicting harm. In my opinion, therefore, the case should go back to the magistrate with an intimation that the offence is proved.

HUMPHREYS J. I agree.

LEWIS J. I agree.

Appeal allowed.

Solicitor for appellant: *Solicitor for Metropolitan Police.*

H. A. P.

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 Dec. 11.

REX v. LICENSING JUSTICES OF BOROUGH OF ROYAL
 LEAMINGTON SPA. *Ex parte* PINNINGTON.

Lord Goddard
 C.J.,
 Humphreys and
 Lewis JJ.

Licensing—Ordinary removal of justices' licence—Removal from premises in county to premises in borough in same county—Borough not county borough—Application to borough licensing justices—Right of justices to refuse jurisdiction—Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24., ss. 2, 24 (3)).

The licensing justices of a borough having a separate commission of the peace, have jurisdiction, under s. 24, sub-s. 3, of the Licensing (Consolidation) Act, 1910, to hear and grant an application for the ordinary removal of a justices' on licence from premises outside the borough to premises within the borough, if the former premises are situated in the same county as the borough.

MOTION for an order of mandamus directed to the licensing justices of the borough of Royal Leamington Spa to hear and determine according to law an application by the applicant, James Pinnington of the Joiners Arms, Shrubland Street, in the borough of Royal Leamington Spa, for the ordinary removal of the justices' licence attached to premises known as the Bull and Butcher at Napton in the county of Warwick to premises known as the Joiners Arms, Shrubland Street aforesaid.

The ground upon which such relief was sought was that on February 5, 1946, when the application came before the justices they wrongfully declined to hear and determine it on the ground that they had no jurisdiction. It appeared from the affidavits that on January 1, 1946, the applicant, James Pinnington,

duly gave notice in accordance with the provisions of the Licensing Act, 1910, of his intention to apply at the general annual licensing meeting for the borough of Royal Leamington Spa to be held on February 5, 1946, for an order sanctioning the removal of a justices' licence authorizing one George James Green to hold an excise licence to sell by retail any intoxicating liquor which may be sold under a publican's licence to be consumed either on or off the premises situate at Napton in the county of Warwick and known by the sign of The Bull and Butcher from such premises to a certain house and premises situate at Shrubland Street in the borough of Royal Leamington Spa and known as The Joiners' Arms of which premises, H. E. Thornley Limited, of Radford Hall Brewery, Radford Semele near Leamington Spa in the county of Warwick, were the owners, and of which licence when removed the said James Pinnington desired to be the holder. The application was opposed at the general annual licensing meeting by various persons who were legally represented. Before the hearing of the application was commenced, the clerk to the justices announced that he had advised the licensing justices that they had no jurisdiction to hear the application. The solicitors for the applicant and for those opposing the application then addressed the justices upon the preliminary objection to the application that the justices had no jurisdiction to hear the application. The licensing justices after having retired with their clerk upon their return into court announced that they had considered the application and had decided that they had no jurisdiction to hear it.

The borough of Royal Leamington Spa is a borough having a separate commission of the peace and is a licensing district within the meaning of s. 2 of the Licensing Consolidation Act, 1910. It has no separate court of quarter sessions nor is it a county borough.

Tristram Beresford K.C. and *Gerald Howard* for the applicant. This case raises a short point which has never previously been before the courts. The borough justices were wrong in refusing jurisdiction to hear the application for removal of the licence. Section 2 of the Licensing Act, 1910, provides that for the purposes of the Act "a licensing district is a petty sessional division of a county, and a borough having a separate commission of the peace." Section 24 deals with ordinary removals and sub-s. 3 provides that "An ordinary removal of a

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" justices' licence may be authorized to any premises within
 " the licensing district in which the premises are situated from
 " which it is desired to remove the licence, or to any premises
 " within a licensing district within the same county by the
 " licensing justices of the district to which it is desired to remove
 " the licence." That section authorizes ordinary removals
 of justices' licences from premises in one district to premises in
 another licensing district so long as both licensing districts
 are in the same county. In the present case the application
 was made to the licensing justices of the district to which
 it was desired to remove the licence. The difficulty is created
 by s. 110 of the Act, which is a definition section. That
 provides that " the expression ' county ' includes any riding,
 " part, or division of a county having a separate commission of
 " the peace and a separate court of quarter sessions." The
 definition of " county " in s. 110 means that only those
 divisions or parts of a county having a separate commission of
 the peace and a separate court of quarter sessions are to be
 treated for licensing purposes as separate counties and as not
 being part of the county in which they are geographically
 situated. As the borough of Royal Leamington Spa had no
 separate court of quarter sessions it remained for licensing
 purposes in the county of Warwick. The section goes on to
 provide that " for the purpose of the provisions of this Act as
 " to appeals from the refusal of licensing justices to grant a
 " renewal, transfer, or special removal of a justices' licence, the
 " area of the county shall be deemed to include any borough,
 " or any part thereof, which is locally situated in the county."
 Those words following the definition of county in s. 110,
 do not exclude boroughs from being, for licensing purposes,
 in the county in which they are geographically situated. The
 words were inserted to compel all appeals against the refusal of
 renewals, transfer, and special removals to be brought before the
 county quarter sessions as laid down by s. 29. Section 29,
 sub-s. 1, provides for an appeal to quarter sessions against
 " the refusal of the licensing justices of any licensing district to
 " grant a renewal, transfer, or special removal of a justices'
 " licence," but there is no right of appeal against the refusal by
 licensing justices to grant an ordinary removal of a justices'
 licence, and s. 110 does not apply to a refusal to grant an
 ordinary removal; it only applies to a case where there is a
 right of appeal against the refusal.

Flowers K.C. and Percy Lamb contra. This point has never

previously come before the courts for the reason that removals of justices' licences from a county to a borough have never been heard of. In the case of an ordinary removal of a justices' licence in a borough no one outside the borough has any right to be heard with regard to the matter. Napton, although in the county of Warwick was in a different licensing district from the borough of Royal Leamington Spa, and therefore no one from the district from which the licence was sought to be removed had a right to be heard on the application for the removal of the licence. Except for the express purposes mentioned in s. 110 a borough is not within the county in which it is geographically situated. By s. 110 a borough is only deemed to be within the county for those express purposes; it is not within the county for other purposes. No one has the power to remove a justices' licence from a county to a borough; such a removal cannot take place. The justices were therefore right in their decision that they had no jurisdiction to hear this application.

Tristram Beresford K.C. replied.

LORD GODDARD C.J. The applicant, James Pinnington, applied to the justices of the borough of Royal Leamington Spa for an order of removal of the licence, held by the licensee of certain premises known as The Bull and Butcher at Napton, in the county of Warwick, from those premises to certain other premises known as The Joiners' Arms, within the borough. Leamington Spa is not a county borough, nor is it a borough having a separate court of quarter sessions; but it is a borough having a separate commission of the peace. The justices of the borough declined to entertain the application on the ground that they had no jurisdiction so to do, apparently being of opinion that it was impossible to apply for the removal of a licence situate in what I may call a county division of the geographical county into a borough within the same county.

On the application for a mandamus to the justices to hear and determine that application, Mr. Flowers has taken the point that the Act does not permit this procedure; that is to say, he contends that you cannot remove a licence from a county licensing division into a borough; and also, I suppose, he would contend that you cannot remove a licence from a borough into a county division. The question that we have to determine is simply one of the construction of the Act. We cannot consider the policy of the matter, unless perhaps there

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were some ambiguous phrase. Then we might have to consider it, according to the well known principles of construction, and to consider what the particular purpose of the Act was, or what was the particular mischief at which it was aimed ; but no such point as that seems to me to arise in this case. The Act contains certain clear provisions and all that we have to do with them is to apply them.

By s. 2 of the Licensing (Consolidation) Act, 1910, it is provided : " For the purposes of this Act, a licensing district " is a petty sessional division of a county, and a borough " having a separate commission of the peace." For this purpose that is all that we need consider. One has, therefore, two licensing districts : petty sessional divisions of a county, and boroughs having a separate commission of the peace. When one looks at s. 24, which is the section which deals with removals one finds that, with regard to ordinary removals, which distinguishes them from what are called in the Act " special " removals," it is provided that " An ordinary removal of a " justices' licence may be authorized to any premises within " the licensing district in which the premises are situated from " which it is desired to remove the licence, or to any premises " within a licensing district within the same county, by the " licensing justices of the district to which it is desired to " remove the licence." For some time I had some difficulty in seeing what was the grammatical construction of that sentence, which I think is somewhat obscure ; but I think that it becomes clear if one removes the words " are situated " to the end of the sentence, so that it reads in this way : " An ordinary " removal of a justices' licence may be authorized to any " premises within the licensing district within which the " premises from which it is desired to remove the licence are " situated, or to any premises within a licensing district " within the same county." That seems to me to deal with two things. You can either remove a licence from premises situate in a licensing district to other premises situate in the same licensing district, or you can remove a licence from premises situate in one licensing district to premises in another licensing district, provided that they are within the same county. That is with what the section deals, I think. When one finds that Leamington Spa is a licensing district and is in the same county as Napton, which is in another licensing district, it follows, I think, from the plain words of s. 24, sub-s. 3, that one can apply to the justices of Leamington Spa for an order of

removal from Napton, which is in the same county, but in another licensing district, to their licensing district, which is again, as I have said, in the same county. If that is so, it seems to me that it is clear that the justices had jurisdiction to hear this application.

The other and rather curious point on which Mr. Flowers relies is that in s. 110, which is a definition section, there is a statement as to what the expression "county" is to include. It is to include "any riding, part, or division of a county having a separate commission of the peace and a separate court of quarter sessions." Pausing there for a moment, that means that the county of York is not the geographical county of York but that each riding of the county of York is a separate county; or, in the county of Sussex, which Mr. Flowers not unnaturally gave as an illustration, East Sussex and West Sussex are two separate counties. That does not throw any light on the question which we have to decide, but it does show that you could not remove a licence from East Sussex to West Sussex; but you could remove it from one licensing district of East Sussex to another licensing district of East Sussex. Then the section goes on: "For the purpose of the provisions of this Act as to appeals from the refusal of licensing justices to grant a renewal, transfer, or special removal of a justices' licence"—it will be observed that the words "ordinary removal" are not included—"the area of the county shall be deemed to include any borough, or any part thereof, which is locally situated in the county, and for the purpose of the powers and duties of quarter sessions as compensation authority, the area of the county shall be deemed to include any borough, not being a county borough, which is locally situated in the county." If one turns to s. 29, which deals with appeals, one finds that exactly the same provision has been made there in effect as is made in s. 110, because it is provided that, in the case of any borough which is situated within the county, the appeal shall lie to the county justices and not to the borough court of quarter sessions. If one may carry one's mind back to the time when this Act was being passed and to the discussions which took place, I think that it may be remembered that one of the reasons, and I think the main reason, for that provision was that it was not thought desirable that the recorder, who had nothing to do with the county in the ordinary way, but was simply a judge of the court of quarter sessions, should be the person who should have to

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decide licensing matters, and, therefore, it was decided that the appeal should go to the county quarter sessions, although the order appealed from arose within a borough. It may be that those words in s. 110 are tautologous and they are not really necessary. If they are not tautologous, they are otiose, because it has been already dealt with in s. 29; and equally the provision that the compensation authority in respect of premises situated in a borough shall be the county quarter sessions may also be redundant, because that has been already provided for in s. 2; but I can only give the words in s. 24 and in s. 2, sub-s. 1 their plain and ordinary meaning. It seems to me to be clear under that, that, provided that the two licensing districts are situated in the same county, an order for removal can be made from one to the other of them, notwithstanding the fact that one is borough and the other is county. For these reasons I think that the order for mandamus must go.

HUMPHREYS J. I am of the same opinion. I think that the matter turns upon the proper construction of s. 24, sub-s. 3. I agree with the construction put upon that section by my Lord. This particular case did not come within the language of the first part of sub-s. 3 of s. 24, because the premises to which it was proposed to remove the licence were not within the same licensing district as the premises from which it was proposed to remove the licence; but I think that this case does come within the second part of that section, because the premises to which it is proposed to remove the licence are within a licensing district within the same county; that is, the county of Warwick. That, in my opinion, really concludes this matter.

I only desire to add that I am not, I think, as much impressed as my Lord is by the difficulty created by the words in s. 110, which deals with appeals. It is true that by s. 29 it is made quite clear that the appeal (which, be it said, does not apply to this case at all, because there is no appeal in the case of a ordinary removal) from a refusal to renew, to transfer, or to grant a special removal is "to the court of quarter sessions for the county in which the premises in respect of which the appeal is made are locally situated, and the appeal shall be to the court of quarter sessions for the county although the premises are situated in a borough having a separate court of quarter sessions." One might perhaps expect to find there some such words as "and for the purpose of this section a

"county shall include a borough having a separate court of quarter sessions." It is true that throughout the Act one finds that that is the notion of the Act ; but, when it came to s. 110, which is the definition section, it was thought (I think not unreasonably) necessary to define these matters. Inasmuch as those words which I have suggested might possibly have been added at the end of s. 29 are not there, the draftsman has to deal with two separate matters ; the question of appeals from a refusal of licensing justices to grant a renewal, transfer, or special removal, and also the case where, a licence having been granted, the compensation authority came in ; and what he has done is to explain what is the meaning of the word "county" in relation to those two separate matters, and they are different, because the first part of the section deals with a county, including a county borough, and in the second part of the section it only includes in the county a borough not being a county borough. It seems to me that that was put there for a purpose. It may be that it was unnecessary. It may be that the court would have construed the Act in the same way without it ; but I think that that is the explanation of why one finds that elaborate definition section ; and, in my view, it makes it all the more clear that this mandamus should go, because it is plain that we have nothing to do with the question to what court an appeal, which does not lie in this case, would lie, if it did lie ; nor are we concerned with the question what is the body to which the question of compensation would go, although there is in truth no doubt about it, because of other sections. In my opinion, as I have said, the matter really depends upon the language of s. 24, and I agree that the mandamus should go.

LEWIS J. I agree, and have nothing to add.

Order for Mandamus.

Solicitors for applicant : *Godden, Holme & Co.*

Solicitors showing cause : *Gregory, Rowcliffe & Co., for Wright, Hassall & Co., Leamington Spa.*

R. F. S.

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Dec. 17.

Lord Goddard
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THOMSON v. KNIGHTS.

Motor car—Conviction for being in charge of motor vehicle whilst under the influence of drink or a drug—Whether conviction bad for uncertainty—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 15.

A conviction for being unlawfully in charge of a motor vehicle whilst under the influence of drink or a drug, to such an extent as to be incapable of having proper control of the vehicle, contrary to s. 15 of the Road Traffic Act, 1930, is not bad for uncertainty for the offence is being in charge of the vehicle in a self-induced state of incapacity, whether induced by drink or a drug.

CASE STATED by the Appeal Committee of Essex quarter sessions.

The appellant, Eric William Thomson was charged before a court of summary jurisdiction at Romford on an information preferred by the respondent, Orlando Knights, and convicted by that court, for being unlawfully in charge of a motor vehicle whilst under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, contrary to s. 15 of the Road Traffic Act, 1930 (1). The appellant appealed against his conviction to the Appeal Committee of the Essex quarter sessions on the ground that it was bad for uncertainty. The Appeal Committee dismissed the appeal and affirmed the conviction, but stated a case for the opinion of the High Court.

Derek Curtis Bennett K.C. and *G. L. Hardy* for the appellant. The conviction of the appellant was bad for uncertainty. He was convicted of being in charge of a motor car whilst under the influence of drink or a drug. He was therefore convicted of two offences in the alternative ; being in charge of a motor car whilst under the influence of drink constitutes one offence, and being in charge of a motor car whilst under the influence of a drug constitutes a second and alternative offence. The justices ought to have stated of which of the two offences they convicted the appellant. An information always contains two counts one for being under the influence of drink and a second count for being under the influence of a drug. Section 15, sub-s. 1,

(1) The Road Traffic Act, 1930, s. 15, sub-s. 1 : " Any person who
" when driving or attempting to
" drive, or when in charge of a
" motor vehicle on a road or other
" public place is under the in-

" fluence of drink or a drug to such
" an extent as to be incapable of
" having proper control of the
" vehicle, shall be liable" to certain
penalties.

of the Road Traffic Act, 1930 provides for six offences and not merely three offences. In *Rex v. Wells* (1) the appellant was summoned and convicted for driving a motor car on a public highway "at a speed or in a manner which was dangerous to the public" and it was held that the conviction was bad for uncertainty. Wills J. there said that "a conviction in an alternative form which involved the two offences was bad." It was held in *Cotterill v. Lempriere* (2) that where a statute creates two distinct offences and provides the same penalty for both, an information and conviction stating the offence in the alternative as contrary to the statute are insufficient. The conviction must state which offence has been committed. In *Rex v. Jones* (3) where a person was summoned under s. 1 of the Motor Car Act, 1903, for, and convicted of, driving a motor car on a highway "recklessly and at a speed which was dangerous to the public," it was held that as the driving of the car was one indivisible act which might constitute both of the offences charged, the conviction was not bad for duplicity. That case is distinguishable because a person's incapacity from drink or a drug would be due to two separate acts. The Motor Car Act, 1903, provided in s. 1, sub-s. 1, for a number of offences which were joined by "or." This appeal ought therefore to be allowed.

Alban Gordon for the respondent. Section 15 of the Road Traffic Act provides for only three and not six offences. The words "under the influence of drink or a drug" are merely adjectival. The offences set out in s. 15 are driving, or attempting to drive, or being in charge of a motor vehicle when the man is incapable of having proper control of the vehicle, and that incapacity is caused by drink or a drug.

Curtis Bennett K.C. in reply referred to *Rex v. Surrey Justices. Ex parte Witherick* (4).

LORD GODDARD C.J. The sole point that was taken before the Appeal Committee and the sole point taken here on behalf of the appellant is that as the conviction states, that he was in charge of a motor vehicle whilst under the influence of drink or a drug, the conviction is bad for uncertainty, because it is said that being in charge of a motor vehicle whilst under the influence of drink is one offence and being in charge of a motor vehicle whilst under the influence of drugs is another offence. In my

(1) (1904) 68 J. P. 392.

(2) (1890) 24 Q. B. D. 634.

(3) [1921] 1 K. B. 632.

(4) [1932] 1 K. B. 450.

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opinion, that contention is not sound. I think it is one offence that is created. I paid great attention to Mr. Curtis Bennett's argument and at first I was rather attracted by it, but I think Mr. Gordon provided the correct answer. The section creates three offences, in my opinion, and not six. The offences are : Driving a motor vehicle while under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle ; or attempting to drive under those circumstances ; or being in charge of a motor vehicle when under the influence of drink or a drug ; and I think Mr. Gordon is right when he says that the words " under the influence of drink " or a drug " are merely adjectival. The offence is driving, or attempting to drive, or being in charge of a vehicle, when the man is incapable of having proper control of the vehicle, and that incapacity is caused by drink or a drug. I do not think Parliament here meant to create one offence of being incapable by reason of a drug and another offence of being incapable by reason of drink. What Parliament intended to provide was that a man driving or attempting to drive, or being in charge of a motor car in a self-induced state of incapacity, whether that incapacity was due to drink or drugs, the man commits an offence in each of those cases. In my opinion the conviction is not for an alternative offence nor can it be said to be in respect of two offences. The offence was being in charge of the car when in this particular state of incapacity. Under those circumstances, I think the appeal fails and must be dismissed.

HUMPHREYS J. I am of the same opinion. I would only observe that in my view the cases were admirably summed-up and explained in the judgment of Lord Coleridge J. in *Rex v. Jones and Others. Ex parte Thomas* (1), where he dealt with the case of *Rex v. Wells* (2), upon which Mr. Curtis Bennett naturally relied, and also the case of *Cotterill v. Lempriere* (3), and another case of *Rex v. Slater* (4), and pointed out that in each of those cases there were two separate offences charged of which a person had been convicted in one conviction, which everybody knows is wrong and contrary to law. He pointed out that in the case with which he was then dealing, of a person charged under one of the sections of the Act of 1903 with driving recklessly and at a speed dangerous to the public, having regard to the circumstances of the case, the real offence was driving in

(1) [1921] 1 K. B. 632.

(2) 68 J. P. 392.

(3) 24 Q. B. D. 634.

(4) (1903) 67 J. P. 299.

a manner dangerous to the public, by reason of one or other of two things, and that a conviction in which the defendant was convicted of those supposed two offences, was really a conviction for one single act. I think the same reasoning applies to this case. I think this person was convicted of the offence of being in charge of a motor car whilst intoxicated or under the influence of a drug to such an extent, as to be incapable of having proper control of the vehicle. I think it is one offence of which he was convicted here, and not two.

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LEWIS J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors for appellant: *Alwyn Williams & Co.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for Arthur Morgan, Chelmsford.*

R. F. S.

SMITH v. POULTER.

1946
Nov. 25.

Landlord and tenant—Rent restriction—Action for possession—Proceedings commenced in High Court—Judgment signed in default of appearance—Judgment including costs—Invalid—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 17 sub-s. 2—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32), s. 3, sub-s. 1.

Denning J.

The landlord of a dwelling-house within the Rent Restriction Acts, having given the tenant notice to quit, issued a writ in the High Court claiming possession. The tenant failed to enter an appearance and the landlord signed judgment for possession, arrears of rent and costs :—

Held, that the judgment was bad for the reasons (1.) that under s. 3 of the Act of 1933, the court had no power to give judgment for possession unless it considered it reasonable to do so and in the present case the question whether the conditions of the Act were satisfied had not been considered; and (2.) that the inclusion of costs in the judgment was contrary to s. 17, sub-s. 2, of the Act of 1920, by which a person who took proceedings in the High Court which could have been taken in the county court was not to be entitled to costs.

APPEAL from a Master.

In 1939, the plaintiff let an unfurnished house to the defendant at 1*l.* 3*s.* 5*d.* a week. The defendant paid the rent until

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April 22, 1946, after which he declined to pay any further rent on the ground that the plaintiff had failed to pay the tax on the house with the result that the Inland Revenue had demanded payment from him, the defendant, and that he saved up his rent weekly for the purpose of paying the Inland Revenue the sum due. The plaintiff contended that he did not pay the tax because the defendant did not pay the rent and gave the defendant notice to quit. The defendant not having given up possession, the plaintiff issued a writ in the High Court claiming possession, arrears of rent and mesne profits, and served a notice under the Courts (Emergency Powers) Rules with a counter-notice attached. The defendant's wife filled in the counter-notice and sent it to the court, but no appearance was entered to the writ. The plaintiff thereupon signed judgment for possession, 29*l.* 5*s.* 5*d.* arrears of rent and mesne profits, and 8*l.* 17*s.* 0*d.* in respect of costs, and took out a summons under the Courts (Emergency Powers) Act, 1939, for leave to proceed. The defendant, by a solicitor, then applied to set aside the judgment and filed an affidavit claiming the protection of the Rent Restriction Acts and explaining the reason for the non-payment of the rent. That application was refused by a master and the plaintiff was given leave to proceed. The defendant appealed to the judge in chambers.

At the hearing before Denning J. the defendant, who appeared in person, stated that he did not understand what was meant by entering an appearance to the writ, but thought that he would be summoned to attend when the case was to be heard. It was admitted that the house was within the Rent Restriction Acts.

Claude Duveen for the plaintiff.

DENNING J. allowed the appeal and in view of the fact that points of general application arose gave his reasons in open court as follows: In my opinion the judgment was wrong for two reasons: (1.) When a house is one to which the Rent Restriction Acts apply, then, under s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the court has no power, even though some rent is in arrear and unpaid, to make an order or give judgment for possession "unless the court considers it reasonable" to do so. That provision limits the jurisdiction of the court with the result that, in any case where there is reason to think that the house is

within those Acts, it is the duty of the court to see whether the conditions required by the Acts are satisfied, even though no such point is pleaded or raised by the tenant : *Barton v. Fincham* (1) ; *Salter v. Lask* (2) ; and *Davies v. Warwick* (3). That was never done in the present case before judgment was signed. The subsequent applications under the Courts (Emergency Powers) Act, 1939 and R. S. C. Or. 47, r. 1, do not touch the point because they proceeded on the assumption that the judgment was valid. (2.) By s. 17, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, if a person takes proceedings under the Rent Restriction Acts in the High Court which could have been taken in the county court, he is not to be entitled to any costs. Notwithstanding that enactment, the judgment in the present case ordered the tenant to pay 8*l.* 17*s.* 0*d.* costs. In these circumstances I allow the appeal, set aside the judgment and award no costs to the landlord.

I desire to draw attention to the following points. In the case of houses within the Rent Restriction Acts the procedure in the county court is better suited to carry out the intentions of the legislature than the procedure in the High Court. In the county court the tenant receives a summons to appear at the court on a named day and on that day the judge inquires into the case to see whether the conditions of the Act are satisfied before he makes an order for possession. In the High Court the tenant receives a writ commanding him to "enter an appearance." If he fails to do so, as he may either because he does not understand what is meant by entering an appearance or because he thinks it sufficient to fill in a counter-notice under the Courts (Emergency Powers) Act, 1939, or because he does not realize that he is protected by the Rent Restriction Acts, then judgment is entered against him automatically without any inquiry whether the conditions of the Acts are satisfied, and it may be a judgment which the court has no jurisdiction to give either in respect of possession or costs.

In cases under the Rent Restriction Acts the legislature has sought to discourage proceedings in the High Court by dis-entitling the plaintiff to any costs. If a plaintiff should choose to proceed in the High Court notwithstanding that discouragement I think the High Court should be informed of the facts so that it may be able to act accordingly. It is desirable, therefore,

(1) [1921] 2 K. B. 291.

(2) [1924] 1 K. B. 754.

(3) [1943] K. B. 329, 336.

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that, in actions in the High Court for possession of a dwelling-house, the indorsement of the writ should state either the reason why the house is not within the Rent Restriction Acts or, if it is within those Acts, what is the ground on which possession is sought.

Appeal allowed.

Case remitted to county court.

Solicitors for plaintiff: *Dixon, Hunt & Tayler.*

H. A. P.

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Dec. 16.
Denning J.

LOWENTHAL v. VANHOUTE AND ANOTHER.

Landlord and tenant—Termination of tenancy—Notice to quit—Notice disregarded by tenant—Second notice given—No waiver of previous notice.

Where a notice to quit given by a landlord is disregarded by the tenant and a second notice is given, such subsequent notice does not constitute a waiver of the earlier notice, and is of no effect unless, with other circumstances, it forms a basis from which an intention to create a new tenancy can be inferred.

SHORT CAUSE.

On February 9, 1946, the plaintiff let to the defendants a furnished flat in her house No. 58, Hanger Hill, Ealing, on a weekly tenancy from Saturday to Saturday, at a rent of four guineas a week. On September 13, 1946, the plaintiff gave the defendants a written notice to quit which was signed by her daughter as her agent, and, on the defendants objecting that a notice so signed was not valid, on September 14, she gave them a further notice, signed by herself, expiring on September 21. The defendants remained on the premises and on September 23, and on subsequent occasions, they tendered rent to the plaintiff, which she refused. On September 30 the defendants referred the matter of the tenancy to a tribunal constituted under the Furnished Houses (Rent Control) Act, 1946. On October 1 the plaintiff's solicitors wrote to the defendants a letter in which they said that as the defendants had ignored the notice to quit which had been given to them, they would be sending them a formal notice to quit the premises on October 12, and on October 4, a formal notice to quit on the day

named was duly sent. The material part of the notice was as follows: "We . . . hereby give you notice to quit and " deliver up possession of all that furnished suite of rooms which " you hold of the said Berthe Lowenthal on Saturday the 12th " day of October, 1946." The defendants having refused to comply with the notice, the plaintiff took proceedings under Or. 14 to recover possession of the premises. In their affidavit in reply, the defendants submitted that the notice to quit given on October 4 waived the notice of September 14 and consequently by virtue of the provisions of s. 5, of the Furnished Houses (Rent Control) Act, 1946 (1) as the notice of October 4 was given after the matter had been referred to the tribunal and before the decision of the tribunal had been given, it could not become effective before the expiration of three months from the date of such decision, and the plaintiff was, therefore, not entitled to possession.

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Garland for the plaintiff. The plaintiff is entitled to recover possession. The notice given on September 14 was a valid one and as it was given before the matter was referred to the tribunal on September 30, s. 5 of the Furnished Houses (Rent Control) Act, 1946, has no application since it only applies in the case of a notice to quit given after the date of the reference to the tribunal.

Ogilvie Jones for the defendants. The proceedings in the present case are premature. The notice to quit given on October 4, constituted a waiver of the notice of September 14, and consequently when the matter was referred to the tribunal on September 30 there was in existence a contract to which the Furnished Houses (Rent Control) Act, 1946, applied, and as the effective notice to quit was given after the date of the reference to the tribunal, the provisions of s. 5 apply. The substantial question, therefore, is whether the second notice to quit waived the previous notice. In Woodfall's Landlord and Tenant, 24th ed., p. 981, it is said that: "Generally speaking, giving a " second notice to quit amounts to a waiver of a notice previously given." The authority given for that proposition is

(1) Furnished Houses (Rent Control) Act, 1946, s. 5: "If, after " a contract to which this Act " applies has been referred to a " tribunal by the lessee or by the " local authority (either originally " or for reconsideration), a notice " to quit the premises to which the

" contract relates is served by the " lessor on the lessee at any time " before the decision of the tribunal is given or within three " months thereafter, the notice " shall not take effect before the " expiration of the said three " months"

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Doc, lessee of *Brierly v. Palmer* (1): see also Halsbury's Laws of England, 2nd ed., vol. 20, p. 142. It is submitted that a second notice to quit waives a previous notice unless there is a presumption that the landlord indicates an intention to keep the first notice alive as, for instance, by taking proceedings on the first notice or doing some act indicating an intention not to waive it. In the present case the plaintiff's solicitors' letter of October 1, and the terms of the notice to quit given by them on October 4, make it clear that they regarded the notice of September 14 as being of no effect and as having been waived and that they recognized that there was an existing tenancy since September 21 which the landlord was then intending to bring to an end by a fresh notice to quit.

Garland in reply. Once a notice to quit has expired there is no question of waiving it. To establish that a new tenancy exists there must be facts from which a jury could infer an intention by the parties to create one: see per Lord Ellenborough, *Doe d. Digby v. Steel* (2). What stronger evidence could there be of a landlord's intention to insist on a notice to quit which he had given than to say to the tenant when he next tendered his rent: "Take it back. I do not want it. You are "not my tenant." That was the attitude of the plaintiff in the present case and coupled with the language of her solicitors' letter of October 1, it clearly shows that she was not treating the defendants as her tenants after September 21.

DENNING J. stated the facts and continued: It is plain from the provisions of s. 5, of the Furnished Houses (Rent Control) Act, 1946, that if, on September 30, when the matter was referred to the tribunal by the defendants, the tenancy was still subsisting, the tenants would have the benefit of the Act, because a notice to quit which was given after September 30 would not be effective before the decision of the tribunal was given, or within three months thereafter. Consequently if the landlord had to rely on a notice to quit given on October 4, she could not claim possession. Her contention is, however, that a notice to quit was given before, and expired before, the tenants applied to the tribunal. The notice given on September 14 was a perfectly good notice to quit and it expired on September 21. It was contended, however, for the defendants that the notice given on September 14 was waived by the subsequent notice which was given by the plaintiff's solicitors on October 4. Passages were cited to me, from Woodfall's Land-

(1) (1812) 16 East 53.

(2) (1811) 3 Camp. 114, 115.

lord and Tenant, 24th ed., p. 981, and Halsbury's Laws of England, 2nd ed., vol. 20, p. 142, to the effect that generally speaking, giving a second notice to quit amounts to waiver of a notice previously given. In my judgment that statement in the text-books is not accurate. It is based on *Brierly v. Palmer* (1). But when that case is examined it does not support the proposition. There is only an observation made by Lord Ellenborough in the course of the argument which is not sufficient to support the proposition. In my opinion the law is now well settled that where a tenancy is determined by a notice to quit, it is not revived by anything short of a new tenancy and in order to create a new tenancy there must be an express or implied agreement to that effect. A subsequent notice to quit is of no effect unless, with other circumstances, it is the basis for inferring an intention to create a new tenancy after the expiration of the first. Applying that test in the present case it is plain that there was no agreement, express, or implied or to be inferred, for the creation of a new tenancy. The tenancy expired on September 21. On September 23, the tenant offered rent. It was refused by the landlord, showing quite plainly that she was not going to create a new tenancy. The mere fact that a solicitor in order to obtain possession and to make it clear that there was no question about the matter, gives another notice to quit is not, in my judgment, any reason for inferring any agreement for a new tenancy. It is plain that the subsequent notice to quit did not create one. I hold that the tenancy came to an end on September 21 and having come to an end, the tenants had no longer any right to be on the premises. When they went to the tribunal on September 30 it was too late because the protection afforded by the Act only applies to notices to quit given after the contract has been referred to the tribunal and does not have any effect on notices to quit given before such reference. Here the notice to quit was given, and had expired, before the matter was referred and consequently the tenants are not protected by the Act.

There must, therefore, be judgment for the plaintiff for possession.

Judgment for plaintiff.

Solicitors for the plaintiff: *Telfer & Co.*

Solicitors for the defendants: *H. G. Greenwood.*

(1) 16 East 53, 56.

P. B. D.

1946

Dec. 9.

Macnaghten J.

PARKER v. BOGGON.

Landlord and tenant—Covenant not to sublet without consent—Consent not to be unreasonably withheld—Proposed sub-tenant enjoying diplomatic immunity—Not good ground for refusing consent.

Prima facie it is not reasonable for a landlord to refuse his consent to the subletting of furnished premises on the ground that the proposed sub-tenant is entitled to diplomatic privilege.

ACTION tried by Macnaghten J.

The plaintiff, who was the executor of the lessee of a flat at 50, Northgate, Regent's Park, London, let the flat, furnished, to the defendant under an agreement dated August 30, 1945, at a rent of 550*l.* a year for the term of one year from July 23, 1945, and thereafter from quarter to quarter until the tenancy should be determined by either party giving to the other one quarter's notice in writing. It was a term of the agreement that the defendant would not assign underlet charge or part with the possession of the premises or any part thereof or of the furniture and effects or any part thereof without the previous consent in writing of the landlord and of the superior landlord, which should not be unreasonably withheld. In March, 1946, the defendant applied to the plaintiff for his consent to the underletting of the premises to a Mr. I. S. Kavur, who was Counsellor to the Turkish Embassy in London. The plaintiff raised various objections and the matter was discussed between the solicitors acting for both parties. The grounds on which objection was taken to the subletting were, inter alia, that the letting to the plaintiff was a personal one, that the flat was trust property and that Mr. Kavur was a person who was entitled to diplomatic privilege. Finally the plaintiff refused his consent. Nevertheless, the defendant, by an agreement dated April 15 1946, in consideration of a premium of 450*l.*, let the flat furnished to Mr. Kavur from March 25, 1946, for a period of nine months less the last day at a rent of ten guineas a week. The plaintiff thereupon brought this action against the defendant claiming possession of the premises on the ground that there was a forfeiture by reason of the breach by the defendant of his agreement not to sublet without the consent of the plaintiff.

At the trial the only ground relied on by the plaintiff for his refusal to consent to the underletting was that the proposed sub-tenant was entitled to diplomatic privilege.

Havers K.C. and *Ahern* for the plaintiff. The only question is whether it was reasonable for the plaintiff to withhold consent to the subletting on the ground that the proposed sub-tenant was Counsellor to the Turkish Embassy and therefore enjoyed diplomatic immunity. The onus of proof that such withholding of consent was unreasonable is on the defendant: *Mills v. Cannon Brewery Co.* (1). If the subletting were permitted, the plaintiff's position would be seriously prejudiced. If the defendant's tenancy were determined the sub-tenant could remain and there would be no way of obtaining possession of the flat and the valuable furniture in it. The plaintiff could also be prejudiced even during the tenancy, since if the sub-tenant was temporarily absent at any time for a month or more and left the flat unoccupied, the landlord's right to re-enter could not be exercised; or, again, the sub-tenant could create a technical nuisance by using the premises as an office or in some other way and it would be impossible to stop him. Therefore it was not unreasonable for the plaintiff to withhold his consent.

Pennycuik for the defendant. On the facts it is not open to the plaintiff to maintain his objection, since his objection on the ground of diplomatic privilege was not really taken until after the grant of the sub-tenancy to Mr. Kavur. The plaintiff originally relied on other grounds for refusing his consent and having stated those grounds he is estopped from setting up the ground of diplomatic privilege. Even if the plaintiff is not so estopped, his objection is without foundation. There is no privity of contract between him and Mr. Kavur and no circumstances could arise in which the plaintiff could sue Mr. Kavur for any rent or any breach of covenant. The liability under the plaintiff's agreement with the defendant was wholly the liability of the defendant. It is true that judgment for possession cannot be obtained against a person having diplomatic privilege, but the landlord is not without remedies. Thus he is entitled personally to eject the tenant: *Woodfall's Landlord and Tenant*, 24th ed., p. 1086. But such action would never be necessary in practice, since a person having diplomatic privilege could not be involved in any scandal of that kind. He would be subject to pressure from his Embassy who would compel him to give up possession peaceably. Therefore the mere possession by the proposed sub-tenant of diplomatic status is no ground for refusing consent to the subletting.

(1) [1920] 2 Ch. 38, 46.

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MACNAGHTEN J. The answer to the plaintiff's claim is that the defendant, by his solicitors, had applied for licence to underlet to Mr. Kavur and that that request had been unreasonably refused. Although in the correspondence which took place before the under-lease was granted various other objections to Mr. Kavur as an under-tenant were raised, here before me the only objection raised is that Mr. Kavur is the Counsellor to the Turkish Embassy, and as such is entitled, by the comity of nations, to diplomatic privileges—amongst others, he cannot be sued in our courts—and it is said that by reason of that fact it was not unreasonable of the plaintiff to refuse consent to an under-lease to Mr. Kavur. The other objections taken were not of a very substantial character. It was said that the defendant had obtained the lease from the plaintiff on personal grounds, which I understand meant on the grounds of personal affection and regard; but that has not been persisted in. Another objection was that the flat was furnished. That also has not been persisted in. Another objection was that it was trust property because the plaintiff is merely the executor of the lessee and does not hold it for himself; but that also is an objection which is not put forward now.

It is said on behalf of the defendant that those three objections were the only objections which were really put forward before the defendant granted the sub-lease to Mr. Kavur, but I think that in the course of conversations between the solicitors representing the parties there was raised at the outset a question whether it would be advisable to let to a person in Mr. Kavur's position, although during the negotiations that objection was rather swamped by the other objections, and it was not until the end of April, when the plaintiff's solicitors took the advice of counsel, that the objection that Mr. Kavur was entitled to diplomatic privilege was put forward as a serious objection to the tenancy.

In my opinion the first point raised by Mr. Pennycuik for the defendant cannot in the circumstances be sustained, because I do not think it was necessary for the plaintiff to put forward his grounds of objection at all. The point that, having put forward some grounds, he is precluded from putting forward a better one, I do not think is sound. But that question is really immaterial, because I am satisfied that the objection that the proposed sub-tenant was entitled to diplomatic privilege was raised at the first interview which

took place between the parties' solicitors. Mr. Havers has argued that it is a good objection. Whenever you let a flat, house, or anything else to a person, you want to be satisfied that he is a responsible person and able to discharge the obligations which he has undertaken. Apart from the banker's reference, the fact that Mr. Kavur was the Counsellor to the Turkish Embassy would have satisfied most people that any obligations that he entered into would be duly discharged, not merely because of the responsibility of a gentleman in that position, but because the Turkish Republic could not afford to allow a man who was accepted by His Majesty as the Counsellor to the Embassy to disregard his contractual obligations with regard to the payment of rent or, indeed, the observing of the covenants which the lease imposed. No sovereign country could afford to allow any question to arise as to its own ministers and officials discharging their obligations in this country.

So I come to the conclusion that it was not reasonable to object to the under-lease to Mr. Kavur on the only ground that is now put forward, namely, that he occupied the responsible position of Counsellor to the Turkish Embassy and was therefore a person who was entitled to the customary diplomatic privileges and immune from proceedings against him in this court. In my opinion, therefore, the defendant has made good his defence and the action stands dismissed.

Judgment for defendant.

Solicitors for plaintiff: *Scott & Son.*

Solicitors for defendant: *Norden & Co.*

H. A. P.

Referred to, MET. BORO'
OF BATTERSEA'S CASE.
[1949] 1 K. B. 434

BRACEGIRDLE v. OXLEY.

BRACEGIRDLE v. COBLEY.

1946

Dec. 18.

Motor car—Dangerous driving—Excessive speed—No actual danger to public—Circumstances to be taken into consideration—Duty of justices—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 11, sub-s. 1.

Lord Goddard
C.J.,
Humphreys,
Lewis,
Cassels and
Denning JJ.

Excessive speed alone may, although it will not necessarily in all cases, constitute dangerous driving within the meaning of s. 11, sub-s. 1, of the Road Traffic Act, 1930.

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GIRDLE
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COBLEY.

Kingman v. Seager [1938] 1 K. B. 397 followed and explained.

It is the duty of justices to obey the rulings of the Divisional Court and to have regard to decisions of that court when those decisions cannot be distinguished from the cases before them.

The Divisional Court will review the decisions of justices not only on points of law and where there was no evidence on which they could have reached their decision, but also where in the opinion of the court their decision was perverse.

CASES STATED by justices.

At a court of summary jurisdiction sitting at Knutsford, Cheshire, an information was preferred by the appellant, a police superintendent, charging the respondent Oxley, a heavy motor driver, with having on January 4, 1946, on a certain road driven a heavy motor lorry at a speed dangerous to the public, having regard to all the circumstances of the case, contrary to s. 11, sub-s. 1 of the Road Traffic Act, 1930 (1).

At the hearing the following facts were proved or admitted. The weight of the lorry in question was over six tons and it was carrying a load of eight tons. The maximum speed allowed by law for that class of vehicle was twenty miles an hour and it was being driven along a road at a speed varying from forty to forty-four miles an hour. It was driven on the correct side of the road and overtook one brewer's lorry, being driven slowly, on a right hand bend, no signal of intention to overtake being given. There was no other traffic on the road and no member of the public was actually placed in danger. The road was a class A wide main road carrying a heavy volume of traffic from Liverpool and Manchester to the Potteries and London. The stretch of the road covered by the police test included one converging road, two bends, five farm entrances and one narrow bridge. When the respondent was overtaken and told of the test, he said: "I was talking and I have no speedometer."

The justices held that the speed of the lorry, although it exceeded the limit, was not, in view of the type of road and the situation of the test, a speed in fact dangerous to the public which was or might reasonably have been expected to be on the road and that there was nothing to distinguish the case from

(1) Road Traffic Act, 1930, "including the nature, condition, s. 11, sub-s. 1: "If any person "and use of the road, and the "drives a motor vehicle on a road "amount of traffic which is "recklessly, or at a speed or in a "actually at the time, or which "manner which is dangerous to "might reasonably be expected "the public, having regard to all "to be, on the road, he shall be "the circumstances of the case, "liable"

any case of exceeding the speed limit. They therefore dismissed the information.

In the second case the respondent Cobley was charged with a similar offence in respect of an articulated motor lorry driven by him on another stretch of road in the same locality. In that case it was found that the maximum speed for the vehicle was twenty miles an hour, that the vehicle weighed four tons unladen and was laden at the material time, that its speed for a distance of two miles varied between forty and forty-eight miles an hour, but was reduced to thirty miles an hour when negotiating a certain bend, and that it was driven on the correct side of the road and passed one car and two lorries during the test without giving signals. It was further found that the road was a wide main road carrying a heavy volume of traffic from Liverpool and Manchester to the Potteries and London, that there were three converging roads and two bends on the section of the road covered by the test and that the respondent, when stopped, said that he knew he was driving at between thirty-five and forty miles an hour but was trying to clear the carburettor. In that case also the justices held that the offence was not proved and dismissed the information.

At the request of the appellant the justices stated a case in each instance for the opinion of the High Court.

On the cases being called on for hearing in July, 1946, the court indicated that, having regard to the decisions in *Kingman v. Seager* (1) and *Durnell v. Scott* (2), a point of considerable importance was raised and ordered the cases to stand over to be heard before a court of five judges.

The cases came before a court of five judges on December 18, 1946.

Edgedale and *J. G. K. Sheldon* for the appellant. The question is whether the court has jurisdiction to interfere with the decision of the justices. The court clearly cannot interfere with a decision of fact, but the question whether there was any evidence on which the justices could come to the conclusion to which they did come is a question of law. That question becomes a difficult one when the justices' finding is negative and before the court could interfere it would have to decide that on the facts the justices were bound to come to the opposite conclusion. In the present case the decision of the justices was one to which no reasonable man could come.

(1) [1938] 1 K. B. 397.

(2) (1939) 83 Sol. Jo. 196.

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Driving at excess speed is *prima facie* driving dangerously and the burden is on the defendant to prove that it was not. In *Kingman v. Seager* (1) the court held that to constitute the offence of driving dangerously within the meaning of s. 11, sub-s. 1, of the Road Traffic Act, 1930, it was not necessary to prove any actual danger to the public, but that it was sufficient if there were potential danger to any persons who might reasonably be expected to be on the road, and for that purpose it was indicated that it might be sufficient to prove excessive speed and nothing more. In that case the case was remitted to the justices with a direction to convict. A similar decision was given in *Durnell v. Scott* (2).

Those two cases make it clear that the object of the legislature was to prevent danger to the public and not merely damage to the road. This court is bound by those decisions, and on the facts of the present cases the decisions of the justices ought to be reversed.

The respondents did not appear and were not represented.

H. L. Parker, appearing as *amicus curiæ* on the invitation of the court to support the justices' decision. The court will not interfere with findings of fact unless there was no evidence on which the justices could so find. In the present case the offence charged is driving at a speed dangerous to the public—not driving recklessly or in a manner dangerous to the public—and the only question is whether the respondent was driving dangerously having regard only to his speed. The offence of driving at an excessive speed is dealt with in s. 10 of the Road Traffic Act, 1930, and there is no presumption that a speed in excess of the maximum is dangerous. It might be perfectly safe in some circumstances for a heavy vehicle to go at forty miles an hour. Here the justices know the local conditions and they have found that there was no actual danger to other traffic. This court should be very slow to interfere with inferences drawn by local tribunals. These cases can be distinguished from *Kingman v. Seager* (1) and *Durnell v. Scott* (2) on the facts, and the dicta in those cases which suggest that mere excessive speed by itself constitutes dangerous driving go too far.

Edgedale replied.

LORD GODDARD C.J. The decision of the justices in these cases seems so startling that one is bound to ask oneself whether it was a decision to which any reasonable bench of magistrates

(1) [1938] 1 K. B. 397.

(2) 83 Sol. Jo. 196.

could come. Here are two motor lorries, in each case of very considerable weight, hurtling along the road at a pace which is found in each case to be over forty miles an hour, passing other vehicles without giving signals, only reducing very slightly in one case at a bend, negotiating narrow bridges and so forth, and it is said that that is not a case of dangerous driving. It is remarkable that the justices in certain parts of Cheshire seem to hold rather strange views on the subject of dangerous driving and also to pay singularly little attention to the decisions of this court, for *Kingman v. Seager* (1) and *Durnell v. Scott* (2) were both cases which came from Cheshire, in both cases the magistrates had dismissed the informations, and in both cases this court remitted the informations, not for further hearing, but with a direction to convict, and it is difficult, without going meticulously into small details, to see any distinction at all between the facts in the present cases and the facts in those two previous cases.

It is said that this court is bound by the findings of fact set out in the cases by the magistrates. It is true that this court does not sit as a general court of appeal against magistrates' decisions in the same way as quarter sessions. In this court we only sit to review the magistrates' decisions on points of law, being bound by the facts which they have found, provided always that there is evidence on which they could come to the conclusions of fact at which they have arrived. Mr. Parker, who has intervened in this case as *amicus curiæ* to enable the court to have the benefit of a full argument on each side, concedes that if magistrates come to a decision to which no reasonable bench of magistrates, applying their minds to proper considerations and giving themselves proper directions, could come, then this court can interfere, because the position is exactly the same as if the magistrates had come to a decision of fact without evidence to support it. Sometimes it has been said of the verdict of a jury given in those circumstances, that it is perverse, and I should have no hesitation in applying that term to the decisions of magistrates which are arrived at without evidence to support them.

The first case to which it is necessary to refer is *Kingman v. Seager* (1). The present cases come from the Bucklow Division of Cheshire where the magistrates sit at Knutsford. *Kingman v. Seager* (1) was concerned with an appeal from a court of summary jurisdiction sitting at Middlewich in Cheshire. The

(1) [1938] 1 K. B. 397.

(2) 83 Sol. Jo. 196.

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facts in that case were very similar to the facts in the present cases. One can find certain small distinctions; for instance, in that case the lorry was driven over a cross road at about forty miles an hour. Though there was not a "cross road" in either of the two cases we are considering there were converging roads, which makes very little difference. Again, in the present cases there were farm entrances, whereas I do not think there were any farm entrances in *Kingman's* case (1). However, the court in that case had no difficulty in reversing the decision of the magistrates, who had found that there was no offence committed, and sent the case back with a direction to convict.

The headnote in *Kingman's* case (1) is as follows: "The offence of dangerous driving under the Road Traffic Act, 1930, s. 11, sub-s. 1, is complete if potential danger to traffic which might reasonably be expected to be on the road is proved, it being unnecessary to establish actual danger to any member of the public." Looking at that headnote alone it might be said that that case can be distinguished on the grounds that the magistrates only considered the question whether persons were actually put into danger and not the question of potential danger by reason of the amount of traffic which might reasonably be expected to be on the road. However, when one reads the judgment of the court carefully it is obvious that the court was sending the case back to the magistrates to convict, because in their opinion the decision to which they came was one to which no reasonable bench of magistrates could come. If the court had been dealing with the case merely on the ground that the magistrates had not considered whether there was potential danger, they would have remitted the case to the magistrates for further hearing. The court would have said: "You have found here there was no actual danger, but that is not enough. You have to consider whether, considering the traffic which might reasonably be expected, though not actually present, there was potential danger." But the court did not do that, but sent the case back with a direction to find that the offence was proved and that there was to be a conviction.

There are expressions of opinion in the judgments in that case, which, taken by themselves, might be understood as meaning that wherever the magistrates find excessive speed then they must find dangerous driving. I think that those expressions of opinion go rather far unless the facts and circum-

stances of that case are clearly borne in mind, and that neither the court, nor any member of it, meant to lay that down as universally applicable, for this reason, that there are many cases in which it would be perfectly safe, apart from any question of danger to the surface of the road, to drive a heavy motor vehicle almost at any rate of speed. If you are crossing Dartmoor or a moor in Yorkshire where you can see for miles, there are no hedges on either side of the road and perhaps the only other vehicle within twenty miles is the police car that is chasing you in your lorry, of course there is no danger to the public, and it would be quite unreasonable then to say you are driving at a speed which is dangerous to the public or in a manner which is dangerous to the public or recklessly, having regard to the amount of traffic, because there is not only no traffic but it would not be reasonable to expect any traffic thereabouts. If the traffic does appear and you do not slow up in your lorry, then a different set of considerations may apply.

I think that what was meant in the judgments in *Kingman's* case (1), and particularly in the judgment of Humphreys J., was that when you take all the circumstances of the case into consideration, speed alone can be decisive. Supposing, for instance, you are driving on an arterial road, say the Great West Road going out of London, or any of the main roads surrounding London or in London; it is obvious that you can be driving there at a pace which in itself must be a danger to the public. I think it is clear that the court, in remitting the case for a conviction in *Kingman v. Seager* (1), were doing so because they thought that the finding of the magistrates was perverse, though that is not stated in terms.

When we come to consider *Durnell v. Scott* (2), we find that it came from the neighbouring petty sessional division of Sandbach. In that case the justices gave their decision in precisely the same words as the justices of Middlewich gave their decision in *Kingman v. Seager* (1), with the exception that they were careful in *Durnell v. Scott* (2) to add to their decision, which was given after the judgment in *Kingman v. Seager* (1), the words: "We did not think there was in fact danger to the public either on the road or which might reasonably have been expected on the road." They put that in, I suppose, hoping thereby to distinguish the case from the previous decision, but this court nevertheless sent the case back to them with a direction to convict, obviously, when one reads the judgments,

(1) [1938] 1 K. B. 397. (2) 83 Sol. Jo. 196.

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because the court came to the conclusion that no reasonably-minded bench of magistrates could come to that decision.

In the present cases the justices of the Bucklow division have found that there were two lorry drivers hurtling down this main road at a speed approaching fifty miles an hour, giving no signals and charging at narrow bridges and so forth. There is no finding that this road is a place where one can see for miles on either side and all down the road, and it is not likely that you would find such a road in that part of Cheshire. The justices have left the court with the fact that this is a main arterial road which carries a great volume of traffic between the great manufacturing towns of the north, the Potteries and London, and in spite of these two previous decisions and in spite of the fact that it had been shown that the addition of the words in regard to potential danger had not saved the magistrates' decision in *Durnell v. Scott* (1), for some reason or other the justices in these cases have proceeded to set out their decision in terms which are copied word for word from the case of *Durnell v. Scott* (1). One feels obliged to say that the magistrates appear to be acting in a somewhat contumacious manner.

Magistrates have to remember that their courts are all inferior to this court and they are under the jurisdiction of this court, and if they persist in disregarding decisions given previously by this court on a set of facts which cannot be distinguished from the facts which are before them in any particular case, then they are guilty of a grave dereliction of duty, because it is their duty to obey the rulings of this court. If they do not obey the rulings of this court and persist in giving decisions which are contrary to the judgments of this court, they will find themselves in serious trouble.

In the present cases I take exactly the same view as the court has done in the two previous cases. In my opinion, it is impossible to say that a reasonably-minded bench of justices, having facts such as these before them, could come to a decision that no offence has been committed and these cases should go back to the magistrates with an intimation that the offences have been proved and with a direction to convict in both cases.

HUMPHREYS J. I agree with the judgment given by Lord Goddard C.J., and I desire to say nothing about the facts of these cases. As to the action which the court has thought

right to take in these cases, I only desire to say that for a very great number of years, whenever justices have found facts from which only one conclusion can be drawn by reasonable persons honestly applying their minds to the question, and have refused to draw that only conclusion, this court has invariably upset the decision of the justices in the appropriate manner.

I want to say one other word as to the judgment which I gave in *Kingman v. Seager* (1). Having read it again I can quite appreciate that that judgment might be read as amounting to this, that the only question that need be considered in a prosecution for driving at a speed dangerous to the public is the speed itself. If it conveys that impression to the reader, then, of course, it is wrong. I did not intend to say that, and I do not think I am reported as saying quite that. What I did say was (2): "I understand the finding of the justices to mean 'that a speed cannot be 'dangerous' unless some element of 'actual danger is proved.'" I added: "That is wrong. 'The danger to which the section refers is to be found in the 'speed itself.'" I there had in mind the language of the section, which I think may be read so far as is necessary for the purpose of these cases as follows: "If any person drives a motor vehicle 'on a road at a speed which is dangerous to the public having regard to all the circumstances, etc., then he is guilty of an 'offence.'" What I wanted to convey was that the manner in which the driver was driving becomes immaterial. He may be convicted because he is driving too fast and only because he is driving too fast, but, of course, there must be taken into consideration all the circumstances of the case, because a speed which is too fast on one road in certain circumstances may not be dangerous at all when driving on another road in other circumstances. I also had in mind the peculiar finding of the magistrates in that case. They said in their case that they had taken into consideration the fact that the vehicle was in good condition, having only one week previously been returned by the makers after being reconditioned, and, in stating their decision, they used the words: "In view of the condition of 'the vehicle, the type of road, and the situation of the occurrence, the speed was not in fact dangerous to the public.'" What I intended to convey was that the question of the condition of the vehicle was immaterial. All that had to be looked at was the speed, and I still hold the view that there may be speeds proved which must in themselves be dangerous to the persons who use the high road. I do not think anyone

(1) [1938] 1 K. B. 397.

(2) *Ibid.* 400.

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can say what is or is not the speed that comes within that category ; but that a person driving along any road in England at one hundred miles an hour would be driving at a speed dangerous to the public would, I think, be admitted by everybody, and the offence, amongst other offences, created by this section is driving at a speed which is dangerous actually or potentially having regard to all the circumstances of the case.

LEWIS J. I cannot usefully add anything to the judgments that have been delivered, with which I wholly agree.

CASELS J. I also agree with the judgments which have been delivered.

DENNING J. I agree. The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony ; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal which sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under s. 11 of the Road Traffic Act, 1930, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, but that is the case here. In my opinion, the conclusion drawn by these justices from the primary facts was not one that could reasonably be drawn from them.

Appeals allowed.

Solicitors for the appellant : *Gregory, Rowcliffe & Co., for Geoffrey C. Scrimgeour, Clerk to the Cheshire County Council.*

Solicitor instructing counsel appearing as amicus curiæ : *Treasury Solicitor.*

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SUTTON v. BOOTLE CORPORATION.

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Nov. 26, 27;
Dec. 16.

Negligence—Personal injury—Licence—Infant—Injury alleged to be caused by defective swing in public recreation ground—Local authority without knowledge of alleged defect—Liability.

Scott and
Asquith L.JJ.
and Vaisey J.

The plaintiff, a girl nine years of age, while attempting to stop and board a moving plank-swing on a children's playground in a recreation ground maintained by the defendant corporation, was dragged off her legs and in attempting to save herself sustained such injury to the index finger of her left hand that it had to be amputated. The part of the swing which caused the injury was in conflict, but it was held by the trial judge that the finger was caught and crushed between the unguarded lug and socket of a checking device designed to prevent the swing from going too far. The swing had been supplied to the corporation by a firm of repute who had supplied a very large number of such appliances all over the country and in connexion with which no similar accident had happened. The corporation had no knowledge of the alleged defect in the swing. On appeal from Stable J., awarding the plaintiff damages:—

Held, that the defendant corporation owed the plaintiff only the obligation of a licensor to a licensee; that as licensors they were under a duty to do no more than warn the plaintiff of dangers actually known to them; and that as they had no knowledge of any danger they were under no liability.

APPEAL from Stable J.

At the Liverpool Assizes on June 4, 1946, before Stable J., without a jury, the plaintiff, Bridget Sutton, an infant, suing by her mother, Mrs. Winifred Sutton, claimed from the defendants, the Mayor, Aldermen and Burgesses of the borough of Bootle, damages for personal injury alleged to have been caused by the negligence of the defendants. On the afternoon of Sunday, July 1, 1945, the girl, aged 9 years, was on a public playground reserved and specially equipped by the defendants for children's recreation and amusement, known as Miller's Bridge playground. She was standing on the ground, awaiting her chance to board a plank-swing, which was constructed to hold five but was only carrying at the moment four children. Eventually she tried to stop the swing as it came past her, and caught hold of some part of it with her right hand, was carried partly off her feet, half fell, and tried to recover herself with her left hand. Unfortunately the index finger of the left hand became caught in some part of the appliance and was so badly crushed that it had to be amputated. What part of the

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appliance caused the injury was in conflict, but Stable J. held that the child's finger was caught between the unguarded lug and socket of the checking device designed to prevent the swing going too far. This particular part of the swing (which was described by an expert witness as the "nutcracker") was characterized by the learned judge as a serious defect which could easily have been remedied. He held that the plaintiff was a licensee, and that the defendants had no knowledge of the danger, but on the ground that it was the duty of a local authority which provided implements for children to play with in a public recreation ground maintained by them, to provide safe and proper implements so far as care and skill could do so, he awarded the plaintiff damages. The defendants appealed.

Clothier K.C. and *R. S. Nicklin* for the defendants. The corporation are not liable. There are three categories in which persons visiting another's premises may fall: invitees, licensees and trespassers. There is no fourth category, such as that envisaged by Maugham L.J. in *Purkis v. Walthamstow Borough Council* (1). See the judgment of Lord Hailsham L.C. in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (2). The infant plaintiff here was a licensee as the trial judge found: *Ellis v. Fulham Borough Council* (3). Before a licensor becomes liable to a licensee for some defect in premises or in a chattel it must be shown that the licensor knew of the existence of the defect and of some risk of danger, and either failed to give the licensee warning or did not take adequate measures to protect him. The learned judge below has found all the elements in the defendants' favour and this court should allow the appeal. [*Latham v. R. Johnson & Nephew, Ltd.* (4), and *Liddle v. Yorkshire (N. Riding) County Council* (5) also referred to.]

Wooll K.C. and *Rose Heilbron* for the plaintiff. There is one dominant element in this case—the corporation was providing allurements for the children, and the allurement was deliberate. It was establishing non-natural attractions which had dangerous potentialities. Therefore this is a case of misfeasance and not non-feasance. The position of a person entering the public recreation ground as of right is different

(1) (1934) 151 L. T. 30.

(4) [1913] 1 K. B. 398.

(2) [1929] A. C. 358, 364

(5) [1934] 2 K. B. 101.

(3) [1938] 1 K. B. 212.

from that of a licensee. If a local authority provides a swing which has traps for the users then it must either provide a different pattern of swing or else have an attendant standing by to guard the children. If the plaintiff child was a licensee the defendants failed to discharge the duties of a licensor, because through their servant they had knowledge of the danger and took no step to warn or protect the plaintiff. It is submitted, however, that in the circumstances of the case the defendants owed a higher duty than that of a licensor, because they were providing what was an allurements to any child. It was therefore their duty to take all the steps to make the appliance safe, which could be suggested by reasonable care and diligence. [*Norman v. Great Western Ry.* (1), *Corporation of Glasgow v. Taylor* (2), *Excelsior Wire Rope Co. v. Callan and Others* (3), *Hardy v. Central London Ry. Co.* (4), *Liddle v. Yorkshire (N. Riding County Council)* (5), *Baker v. Bethnal Green Borough Council* (6), and *Mersey Docks & Harbour Board v. Proctor* (7) referred to.]

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Dec. 16. SCOTT L.J. This appeal is by the defendant corporation against a judgment of Stable J. in an action brought on behalf of a girl, nine years old, claiming damages for personal injury alleged to have been caused to her by the negligence of the corporation. The learned judge decided in her favour and awarded her 404*l.* 19*s.* 6*d.* The appeal is on liability only, but if the judgment below is right it will have far-reaching consequences all over the country for the innumerable local authorities who have playgrounds equipped with the many varieties of such appliances; although that consideration cannot affect our decision. The defendants' liability, as claimed on behalf of the plaintiff and found by the learned judge, was that which modern text-books on the law of torts put under the general heading of "dangerous structures and premises," where the responsibility of the occupier varies according to the relationship in which the plaintiff stands towards him, i.e. according as it is that of invitee or of licensee or of trespasser. I have no doubt that the general relationship of children coming to play on a

(1) [1915] 1 K. B. 584.

(2) [1922] 1 A. C. 44, 52.

(3) [1930] A. C. 404.

(4) [1920] 3 K. B. 459.

(5) [1934] 2 K. B. 101, 112.

(6) (1945) 43 L. G. R. 75.

(7) [1923] A. C. 253, 274.

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children's playground by the public invitation of the local authority is that of licensees ; and that, therefore, it was that measure of responsibility which alone was borne by the Bootle Corporation. In the case of a licensee liability attaches, in my opinion, only if the occupier knows of the danger and fails to protect or warn. To decide in any particular case whether liability attaches, it is therefore essential to understand the nature of the danger very clearly. The court cannot otherwise safely decide the issue of knowledge or no knowledge.

The story of the accident is this. [His Lordship stated the facts and continued:] How and by what the finger was caught and crushed was, in my opinion, never proved with any certainty. The learned judge, however, held that it was in a part which was christened by the plaintiff's expert witness "the nutcracker." On the other hand, he found that the defendant corporation had no knowledge of the existence of danger and acquitted them of any want of care in relation to the swing. He held that the plaintiff was a licensee ; none the less he held that the defendants were liable on the ground that because of the "nutcracker" the swing was "defective," saying that it was "a serious defect in this particular type of "swing which could easily be remedied." He rejected the defendants' contention that to the plaintiff, as a licensee, they were only under a duty to warn or protect the plaintiff if they knew of the defect, and consequently he imposed upon the defendants a measure of duty which was in my opinion erroneous in law. I might limit this judgment to that question of law, but having regard to the very widespread and highly desirable provision by local authorities of these playgrounds with mechanical amusements for children, I think it better to state the facts with particularity. [His Lordship described and explained the mechanism of the swing and the braking device and from the calculations which he made he deduced that it was prima facie unlikely that the child's tiny finger could ever have been caught between the lug and the socket, by reason of the height from the ground at which the "nutcracker" would close sufficiently to be a source of danger. He continued:] On this as on other issues of fact the burden of proof was on the plaintiff to prove that the danger point for her was near enough and low enough to be within reach of her hand, but no expert evidence was given to prove the height above the ground at which the nutcracker closed enough to grip her tiny finger if it was there to be caught.

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I am not a mathematician ; but, on my suppositions, how much lower than 5 feet 6 inches above the ground would the mouth of the nutcracker close enough to grip the tiny finger ? I can see no evidence which would even to a skilled engineer, indicate danger. A fortiori there was no evidence that the corporation or its playground attendant had the faintest notion of the presence of the danger indicated by the question-begging word "nutcracker," used by the plaintiff's expert. Whereas the nutcracker was always open $1\frac{3}{4}$ inches at the bottom of the swing (in whichever direction the swing was moving), it is clear that the plaintiff was standing with her face towards the swing as it was coming down past her (as I think) from right to left, and therefore that the "nutcracker," which at the top had been open $3\frac{1}{2}$ inches, was in process of closing to its width of $1\frac{3}{4}$ inches at its bottom position, and would not close, altogether till (on my supposed figure) the swing up to the left reached to an angle of something like 55° from the vertical or some feet above the child's reach. The fact that she had half fallen and so reduced her upward reach makes it still more difficult for her to get her hand up to anywhere near the point where the "lug" and the "socket" would come close enough together to grip the finger. The learned judge's comment in his judgment that the defect was one "which could quite easily be remedied," following on his observations earlier, makes me wonder whether he really appreciated the working of the mechanism. I certainly did not until I had thought about it quite a lot. The plaintiff's evidence is contained in her answers to the questions beginning at the bottom of page 1 of the transcript : "Q. Stable J. : You tell me what happened ?— "A. The girls were swinging the jerking boat, and I was trying to get on. I got hold with that hand and my hand slipped right down and got in between the two bars. The two bars got close together, and my finger came right off. "Stable J. : Did you get that ? Mr. Clothier : Some of it. "Stable J. : She got hold with her hand, she said : it slipped down, got between the bars, and her finger came right off." My comment is that if her left hand got hold of the hanger bar and slipped down it, it could not have been caught ; for the very simple reason that at the bottom of the swinging movement the socket on the hanger bar was $1\frac{3}{4}$ inches away from the lug of the stirrup. As I have already said it seems probable that the two would not approach each other near enough to grip the child's finger, until the hanger bar had swung onwards and upwards to a height some feet above

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the bottom point. There is no indication in the transcript of anybody pointing out this apparent misapprehension of the mechanical possibilities ; but it throws prima facie doubt on the inference of fact at which the learned judge arrived. On the other hand the case for the defendants presents comparable though different difficulties. The place where they contend that the finger was caught is between the underside of the plank and the topside of the stirrup. That gap too comes into and out of existence like the "nutcracker" as a result of the same cause, viz., the compression or release of the brake springs. It opens as the springs are compressed and closes as they are released, i.e., the precise opposite action to that of the "nutcracker." As the latter closes, the stirrup opens, and vice versa. If (as I have inferred was the fact) the accident happened in point of time just as the right-hand pair of hanging bars came past the plaintiff from right to left, it is important to remember, first, that there had been no compression at any time during that downward swing, and, secondly, that compression did not begin till after the upward half of the same oscillation had (on my guessing) taken the hanger bar to—say—55° from the vertical (or thereabouts). These facts seem to me to make it equally, or even more unlikely that she got her left hand really under the plank at a time and point when and where the plank had risen enough on the upward swing for the hanger bar not only to have come into contact with the lug, but, also, to have compressed the springs enough to depress the stirrup and produce the necessary gap to admit the finger.

The other children who gave evidence said that it was the "nutcracker" where the finger was caught. The park attendant said it was between the stirrup and plank, because he saw there what he thought was a piece of skin. The learned judge found as a fact that it was the former. In spite of my assumed figures of angle and height, I do not think that we can differ from him. The only reason why I have at such length discussed the probabilities on this issue of fact is that it seems to me to compel the inference that the defendant corporation had neither knowledge nor suspicion that this danger was present in the spring ; and there was no evidence of anything to put them on inquiry. The view taken by the learned judge would make the corporation's legal position almost that of an insurer of all children against all accidents caused by amusement plant, though bought from first-class

suppliers and well maintained as this was. The suppliers of this swing were a well-known, thoroughly competent firm of manufacturers making and dealing in such plant and apparatus. They had supplied 150 to 200 such swings all over the country. There had never been any similar accident. There was nothing to suggest that the swing was not maintained in perfect condition. In the absence of expert evidence on the points I have raised I find it very difficult to see how the accident happened ; but it did happen.

Since writing the above explanation of the facts, so far as I can understand them, I have read the discussion of the law in the draft judgment of Asquith L.J. I agree with all he says and it is unnecessary for me to add anything. The appeal must be allowed, because the defendants have incurred no legal liability, although one cannot help feeling sorry for the girl.

ASQUITH L.J. (read by VAISEY J.): Counsel for the plaintiff has conveniently summarized the learned judge's findings of fact as follows : (1.) That the child's finger was nipped between the " lug " and the socket. (2.) That the swing was defective and dangerous ; (3.) That the defendants did not know this ; (4.) That the defect could have easily been remedied ; and (5.) That there was no contributory negligence by the plaintiff. Like Scott L.J., I see no justification for disturbing any of these findings, though, as he has pointed out, the first might be open to some question. Plaintiff's counsel, on the argument of the appeal, accepted all except the third. I propose first to consider the legal position on the assumption that all of the findings, including the third, stand ; and secondly, the question whether finding (3.) can be successfully impeached.

I agree with my Lord that the defendants owed the plaintiff the obligation of a licensor to a licensee and no more. A licensor is bound to do no more than warn a licensee entering land in his occupation of dangers actually known to him, and, since in this case the licensors have been found not to have known the danger, if any, the appeal should be allowed. (Lord Hailsham's dictum in *Robert Addie & Sons (Collieries) v. Dumbreck* (1), which purports to impose on the licensor a duty to warn not only of dangers known to him but of any dangers of which he ought to have known, is inconsistent with other decisions of the House and has been recognized by this court

(1) [1929] A. C. 358.

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as uttered per incuriam) (*Ellis v. Fulham Borough Council* (1).) The first issue of law is whether the plaintiff was a licensee and no more. The statement of claim is based entirely on the allegation that she was an invitee, though the argument for the plaintiff on the appeal exceeded the ambit of this allegation, and the learned judge in my view gave judgment for her on a basis inappropriate in law to the rights either of a licensee or of an invitee. The effect of the authorities as to who is an invitor and who a licensor is summarized in Salmond on Torts, 10th Edition, page 476, in a well-known passage, which in *Ellis v. Fulham Borough Council* (1) was approved by this court and embodies the following neat test. "The invitor " says: ' I ask you to enter on my business ' The licensor " says: ' I permit you to enter on your business.' " Judged by this test it seems plain that the plaintiff was a licensee.

Two factors were relied on in this court as imposing on the corporation a more stringent liability than that of licensors. These factors are said (it was not clear to me from the argument whether severally or in their combination, but I will assume the former) to constitute the defendants inviters or to invest them with equivalent liabilities. The first is that the plaintiff entered the recreation ground not by mere leave and licence but " as of right." The second is that the swings constituted in relation to a child an " allurement " and as such may " step " up " the obligations of the defendants. I will consider these contentions in turn.

1. The suggestion that persons entering on publicly or municipally-owned parks or recreation grounds enjoy a special privileged status superior to that of licensees would seem to be ill founded. Text-book authority is opposed to the existence of such a separate class. (See Salmond on Torts, 10th Edition, pp. 485-7, Winfield, 2nd Edition pp. 616-20). As to the authorities, *Robert Addie & Sons (Collieries) v. Dumbreck* (2) appears to decide that persons entering on premises in the occupation of others (otherwise than under a contract) are classifiable exhaustively as either trespassers, licensees, or invitees, and that there are no intermediate or hybrid classes, such as that envisaged by Maugham L.J., as he then was, in *Purkis v. Walthamstow Borough Council* (3). *Coates v. Rawtenstall Corporation* (4) is a direct decision of this court that a municipal authority owning or occupying a recreation ground—in that

(1) [1938] 1 K. B. 212.

(2) [1929] A. C. 358.

(3) 151 L. T. 30, 32.

(4) (1937) 157 L. T. 415.

case as in this, supplying thereon swings for children—is a licenser and not an invitor. I know of no decision of the Court of Appeal deciding the contrary. *Ellis v. Fulham Borough Council* (1) is, I think, certainly not such a case, in spite of the doubts expressed by Greer L.J. Slessor L.J. and MacKinnon L.J. are emphatic the other way. Nor I think can *Purkis'* case (2) be so construed. Unless *Coates v. Rawtenstall* (3) can be shown to be inconsistent with a decision of the House of Lords we are bound by it. The only decision of their Lordships with which it might be argued it was inconsistent is *Corporation of Glasgow v. Taylor* (4). For reasons which follow it is not in my view inconsistent with that decision. The opinion of Lord Atkinson in that case certainly lends some colour to the view that a person entering a municipally-owned park is an invitee : but the opinions of the majority, though some of them certainly use the expression entering “ as of right,” are very far from amounting to a clear-cut decision that persons entering public parks are more than licensees. The *Glasgow Corporation* case (4) was argued in effect on demurrer, and all it decided was that the pursuer's averments could not be struck out as disclosing no cause of action. The headnote is as follows : “ The father of a boy, aged seven, who died from eating the “ berries of a poisonous shrub growing in some public gardens “ in Glasgow, sued the Corporation as the proprietors and “ custodians of the gardens for damages for the death of his “ son. The pursuer averred that on a piece of fenced ground “ in the gardens of the defenders grew, among other specimen “ plants, a shrub bearing poisonous berries which presented “ a tempting appearance to children ; that this enclosed piece “ of land was open to the public, access thereto being by a gate “ which could be easily opened by young children, and “ was in a part of the gardens much frequented by children ; “ that the pursuer's son, with some other children, entered the “ gardens and ate some of the berries of this poisonous shrub “ and died ; that the defenders knew that these berries were “ a deadly poison, but took no precautions to warn children “ of the danger of picking the berries of this shrub or to prevent “ them from doing so ; and that there was no adequate notice “ in the gardens warning the public of the dangerous character “ of the specimen shrubs growing therein :—*Held*, that the “ pursuer's averments disclosed a good cause of action against “ the defenders, and that the action ought to proceed to trial.”

(1) [1938] 1 K. B. 212.

(3) 157 L. T. 415.

(2) 151 L. T. 30.

(4) [1922] 1 A. C. 44.

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The actual averments as set out, not in the headnote, but afterwards, do, it is true, allege that the defenders knew *or ought to have known* that the berries were a deadly poison. But the case proceeded on the footing that actual knowledge had been alleged. No one seems to have adverted to the distinction between actual and constructive knowledge. Thus Lord Buckmaster says (1) "thirdly, the danger was known "to the appellants"; and Lord Atkinson (1) says: "The "defenders were therefore aware of the existence of a concealed "or disguised danger to which the child might be exposed," and he repeats this on page 56. The suggestion which recurs in the speeches of their Lordships that the children entering this public park entered "as of right" was the result of an admission by counsel, which in the language of Lord Sumner "may have meant no more than that the child was not doing "wrong in the Botanic Gardens, having an unconditional leave "and licence of the defenders." It is obvious from these circumstances that the case was very far from deciding that a person entering on a public park is an invitee or necessarily more than a licensee. It merely decides that an averment of the facts of entry plus an allegation that the defenders knew of the danger was not demurrable: obviously, so far as it averred actual knowledge it was not: and no issue was raised as to whether the additional words "or ought to have known" made any difference, for their Lordships either did not appreciate that those words were included or treated their inclusion as immaterial. Before leaving *Glasgow Corporation v. Taylor* (1), I would point out a further and vital distinction between that case and the present, namely, that in the first, knowledge by the defendants of the danger was alleged (and for the purposes of a demurrer such allegation had to be assumed to be true): whereas in the instant case it has been found as a fact not to exist.

2. Before, however, passing to the issue of knowledge *vel non* (which the last sentence anticipates), I must briefly deal with the issue raised by the word "allurement"—the other factor relied on as raising the obligations of the defendants to a higher level than that of licensors. The presence of this element, which is of course only relevant when the entrant on the defendant's premises is a child, would seem, where it exists, to affect the occupier's duty to this extent, that a danger which is patent to an adult may not be apparent to

(1) [1922] 1 A. C. 44, 50, 53, 56.

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a child ; to a child it may be a concealed trap ; accordingly that a warning or other preventive measure may be called for in the case of a child, when it would not be called for in the case of an adult, or a warning of a more emphatic or coercive character than would suffice in the case of an adult. What objects are and what are not in law "allurements" ? An exhaustive catalogue has not been laid down. Turntables, escalators and paddling pools have been held to "allure." Rivers, ponds and piles of paving stones have been held insufficiently seductive. Clerk and Lindsell on Torts, 10th Edition, pp. 545-6, place *swings* in the unalluring class, citing as authority *Ellis v. Fulham Borough Council* (1). If this classification is right it disposes of this branch of the argument. But I doubt if the case goes so far. If a swing or this swing is an allurement it is sufficient to say that no case would appear to exist in which a plaintiff relying on allurement has succeeded, save where there was actual knowledge by the defendants that the alluring object was dangerous. There was, for instance, knowledge in *Glasgow Corporation v. Taylor* (2), *Coates v. Rawtenstall Corporation* (3) (if a swing is an allurement) and *Ellis v. Fulham Borough Council* (1). It would seem, then, that the plaintiff was a mere licensee.

The other point is whether the finding that the defendants did not know the dangerous character of the swing (if dangerous it was) ought, as counsel for the plaintiff argues, to be disturbed. My Lord, in the judgment just delivered, has given a detailed description of the mechanism of the swing, which I respectfully adopt and will not repeat. Having regard to its construction and working, the occurrence of an accident to a small child with a very limited reach was in my view extremely unlikely and there were ample materials on which to base a finding that neither through the attendant nor otherwise can knowledge of its dangerous character—if indeed it can be held to have possessed any—be properly imputed to the defendants.

In conclusion, I would remark that the learned judge in pronouncing for the plaintiff has assumed a standard of duty on the part of the defendants which is higher than any due even in the case of an invitor. On the stricter of the two alternative views an invitor's duty goes no further than that he shall use reasonable care to see that the premises are safe. He, however, has held in effect that the occupier warrants that

(1) [1938] 1 K. B. 212.

(3) 157 L. T. 415.

(2) [1922] 1 A. C. 44, 50, 53, 56.

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the premises shall be safe as reasonable care and skill (on the part of anyone) can make them : and he invokes in support of this decision, apart from a dictum of Scrutton L.J. in *Purkis' case* (1), the speech of Lord Maugham in *Wilson & Clyde v. English* (2) which, like that case, concerned purely the rights and duties as to safe plant, system of working, etc., as between employer and employee ; a relationship not involved in this case. The other case in which this high standard of duty is exacted is that typified by *Francis v. Cockrill* (3), a case of entry under a contract and equally remote from that under review here.

I agree that the appeal should be allowed.

VAISEY J. I have had the advantage of reading the judgments just delivered, and I agree that on the grounds therein stated this appeal must be allowed. I would only add a few supplementary observations. So far as the facts of the case are concerned, I share my Lord's perplexity as to the precise manner in which the plaintiff's finger came to be injured. Each of the two rival theories ("nutcracker" and "stirrup") is supported by some evidence, and while I am not prepared to dissent from the learned judge's finding in favour of the former, I think that each presents difficulties of a somewhat formidable character. So much so, that I should not be indisposed to postulate a third possibility, such, for example, that the plaintiff's finger was crushed between the upper surface of the plank and the heel of the child who was standing upon it—which might, I think, quite easily have happened without either of the children becoming aware of it. All that is really certain is that the accident did in fact happen somehow, and the very uncertainty as to its exact cause convinces me that the defendant corporation did not know, and indeed could not have known, of the existence of any defect, if defect there was, or of any latent danger in the mechanism of the swing. The number of "journeys" which had been made by this swing, and by the 150 to 200 other swings of similar construction, must be of almost astronomical magnitude, running, I suppose, into millions. Queues of heedless small people waiting their turn by the side of the moving "boat" must have formed on tens, or perhaps hundreds, of thousands of occasions ; and many thousands of children must have

(1) 151 L. T. 30.

(2) [1938] A. C. 57.

(3) (1870) L. R. 5 Q. B. 501.

tried to arrest its movement with their hands. Why then had this particular kind of accident never occurred before? It is extremely difficult to say; and equally difficult, to my mind, to suppose that its occurrence could possibly have been foreseen. I agree in the view that the effect of the judgment under appeal was to put the defendant corporation in the position of an insurer of the plaintiff against an utterly unpredictable risk. The authorities binding upon this court appear to me clearly to establish that on the defendant corporation's playground the plaintiff had the status of a licensee and was, as such, entitled to no greater protection than that afforded to her by being warned against such of the dangers which she might encounter there as (being latent as opposed to apparent or obvious dangers) were actually known to the defendant corporation. A swing must always be a source of danger to children who incautiously get in its way while it is in motion, but that is an apparent or obvious danger against which no special warning would be necessary or appropriate. I am satisfied that no knowledge can be imputed to the defendant corporation of any danger, or any risk of danger, or of any defect of any kind in the swing, and that there has been no breach of any duty owed to the plaintiff by the defendant corporation to form a foundation for her action.

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Appeal allowed, with costs.

Solicitors for plaintiff: *Isadore Goldman & Son, for Silverman & Livermore, Liverpool.*

Solicitors for defendants: *P. F. Walker, for Weightman, Pedder & Co., Liverpool.*

A. W. G.

Distinguished. HARRISON v. HOPKINS.
[1949] 2 All E.R. 597.

Distinguished. HARRISON v. HOPKINS.
[1950] 1 K. B. 124

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Dec. 10, 18.

Landlord and tenant—Rent restriction—Claim for possession of dwelling-house—Claim made by personal representatives and sister of deceased person—Bequest of house to trustees upon trust for sale and conversion—Sister beneficiary under will, but not entitled to sole beneficial interest—Tenancy determined to enable sister to go into occupation—Right of plaintiffs to maintain action—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32), s. 3, Sch. I., para. (h).

Scott,
Tucker and
Bucknill L.JJ.

By sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, a court shall have power to make an order

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for "the recovery" of possession of any dwelling-house to which the principal Acts apply without proof of suitable alternative accommodation if "(h) the dwelling-house is reasonably required by the " landlord . . . for occupation as a residence for himself."

A testatrix by her will devised to her two trustees her freehold bungalow and land upon trust to sell the same with power to postpone the sale as long as they thought proper, and she directed her trustees to stand possessed of the freehold property or the proceeds of the sale thereof upon trust to permit the testatrix's sister during her life until the sale of the property to have the use and enjoyment thereof, and after the death of her sister the testatrix gave the trust fund to her niece absolutely. The testatrix expressed the wish that no sale of the property should take place during the lifetime of her sister. The trustees let the premises to the defendant on February 19, 1941, for a term of one year at a weekly rent of 1*l.* 2*s.* 6*d.*, which tenancy was extended from time to time and was finally determined on May 19, 1946, for the purpose of enabling the sister to go into occupation of the house which was within the Rent Restriction Acts. The two trustees of the will and the sister of the testatrix brought an action in the county court claiming to be entitled to possession under para. (h) of the First Schedule to the Act of 1933 on the ground that the house was required for occupation as a residence by the sister. The county court judge made an order for possession. On appeal :—

Held, that the trustees, being alone entitled to bring proceedings in ejectment to recover possession of the property, were the only proper plaintiffs to bring proceedings for recovery of possession under the Rent Restriction Acts, but were precluded from recovering possession as they could not avail themselves of the provisions of para. (h) of sch. I. to the Act of 1933, as they had no beneficial interest in the dwelling-house: *Sharpe v. Nicholls* [1945] K. B. 382 followed: and that the testatrix's sister not being a person who could have brought proceedings in ejectment to recover the land, could not bring them under the Act of 1933, and therefore was not a proper party to the action. No order for possession could, therefore, properly be made.

APPEAL from the Worthing county court.

The plaintiffs claimed possession from the defendant of a dwelling-house known as "Denmaro," St. Thomas Road, Worthing. The following statement of facts is taken from the judgment of Tucker L.J.

The plaintiffs were Alan Hodgson Parker, Warren Edward Lovesey and Edith Marianne Christine Marsh. The first two plaintiffs were trustees of the will of Emma Jessie Marsh, deceased, who died on February 20, 1937, and the third plaintiff was a sister of the testatrix and a beneficiary under her will. The relevant words of the will were as follows: "I devise and bequeath to my trustees (free of all estate legacy and

" succession duty and the duties, if any, on such duty) my
 " freehold bungalow and land known as ' Denmaro,' St. Thomas
 " Road, Worthing, aforesaid Upon trust to sell and convert
 " the same into money at such time and in such manner as my
 " trustees shall think fit and so that my trustees shall have the
 " fullest power to postpone such sale or conversion for so long
 " as they may think proper without being responsible for loss
 " and I direct my trustees to stand possessed of the said freehold
 " property or the proceeds of sale thereof or the investments
 " for the time being representing the same (hereinafter called
 " the trust fund) Upon Trust to permit my sister Edith
 " Marianne Christine Marsh during her life until sale of the said
 " property to have the use and enjoyment thereof or to receive
 " the net rents and profits thereof and thereafter during the
 " remainder of her life the income of the net proceeds of sale
 " thereof or of the investments from time to time representing
 " the same and from and after the date of the death of the
 " survivor of myself and my sister I give the trust fund both
 " capital and income thereof to my niece Nora Kathleen Marsh
 " absolutely and I hereby declare that it is my wish but without
 " in any way limiting the discretion hereby conferred upon my
 " trustees and without creating any trust or legal obligation
 " that as far as possible no sale of the said property shall take
 " place during the lifetime of my sister the said Edith Marianne
 " Christine Marsh."

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By an agreement in writing dated February 19, 1941, the trustees let the premises in question to the defendant for a term of one year at a weekly rent of *1l. 2s. 6d.* The tenancy was extended from time to time and was finally terminated on May 19, 1946. During the tenancy the third plaintiff (hereinafter referred to as " Miss Marsh ") received the rents and profits from the house by permission of the trustees. The tenancy was determined by the trustees for the purpose of allowing Miss Marsh to go into occupation of the house pursuant to their discretion under the will to permit her to have the use and enjoyment thereof during her life. The house was within the Rent Restriction Acts and the plaintiffs claimed to be entitled to possession under para. (h) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (1)

(1) Rent and Mortgage Interest " s. 3 of this Act, have power to
 Restrictions' (Amendment) Act, " make or give an order or
 1933, Sch. I., provided: " A " judgment for the recovery of
 " court shall, for the purposes of " possession of any dwelling-house

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The county court judge made an order for possession of the house in favour of the plaintiffs against the defendant.

The defendant appealed.

Fay for the defendant. The two plaintiffs, who are the personal representatives and trustees of the testatrix, cannot take advantage of para. (h) of sch. I. to the Act of 1933, because they have no beneficial interest in the house and do not require the dwelling-house as a residence for themselves : see *Sharpe v. Nicholls* (1) per Morton L.J. They are not landlords of the house but merely lessors. There is no definition of "landlord" in the Act of 1933, although there is a definition of "landlord" in s. 12, sub-s. 1 (g) of the Act of 1920 (2), but that definition is not incorporated in the Act of 1933, and although s. 18 of the Act of 1933 says that that "Act and the "principal Acts may be cited together as the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933," it does not say that the Act of 1920 and the Act of 1933 shall be read and construed together as one Act, and therefore the definition of "landlord" in the Act of 1920 cannot be said to be imported into the Act of 1933. The third plaintiff, Miss Marsh, has no interest in the property as property because it has been devised to the trustees of the will upon trust for sale and conversion, her only right is to bring an action against the trustees. Further she is not solely entitled to the property or the proceeds of the sale thereof because that goes on her death, to her niece absolutely. It would have been quite simple for the testatrix to have made her sister tenant for life under the Settled Land Act in which case the sister would have been landlord, but the testatrix did not do that. If the testatrix had let the house herself she could not have recovered possession of the house in order to allow her sister to reside there as those facts would not have come

"to which the principal Acts
"apply without proof of
"suitable alternative accom-
"modation (where the court con-
"siders it reasonable so to do)
"if (h) the dwelling-house
"is reasonably required by the
"landlord for occupation as
"a residence for himself."

(2) Rent and Mortgage Interest
Restrictions Act, 1920, s. 12,
sub-s. 1 (g) : "The expression
" 'landlord ' also includes in re-
"lation to any dwelling-house any
"person, other than the tenant,
"who is or would but for this Act
"be entitled to possession of the
"dwelling-house."

(1) [1945] K. B. 382, 389.

within para. (h) of the schedule to the Act of 1933. The only proper plaintiffs are the two trustees who let the house. If they had brought an action alone to recover possession of the house their action must have failed because it would not have been brought to recover possession of the dwelling-house for occupation as a residence for themselves but for the occupation of someone who was neither their father or mother, nor son or daughter. They are not entitled to do that as they are only lessors and not landlords. There is in fact no landlord of the property for the purposes of para. (h). This is a claim at common law and the tenant would be entitled to have the name of the third plaintiff struck out. Even if she is properly a plaintiff still she is not a landlord because she has not the sole beneficial interest in the property. The county court judge was not entitled to find on the evidence that there would be greater hardship on the plaintiffs than on the defendant, if he did not make an order for possession.

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Dutton Briant and *F. K. Grazebrook* for the plaintiffs. The definition of "landlord" in s. 12, sub-s. 1, of the Act of 1920 does apply to the Act of 1933. The plaintiff, Miss Marsh, is a person who but for the Rent Restriction Acts would have been entitled to possession of the dwelling-house and therefore comes within the definition of landlord in s. 12 of the Act of 1920. Under para. (h) of sch. I. to the Act of 1933, the landlord is the person who would be beneficially entitled to the dwelling-house. The two trustees are entitled to bring the action for possession but when the question is, who has suffered hardship, under that paragraph, it is the person who but for the Rent Restriction Acts would be beneficially entitled to possession, namely, Miss Marsh. [Tucker L.J. That is contrary to the view of Morton L.J. in *Sharpe v. Nicholls* (1).] Section 16 of the Act of 1933 does not repeat any of the definitions in s. 12 of the Act of 1920, except the definition of "dwelling-house" which is given for a good reason. In the Act of 1920 "dwelling-house" is defined according to financial limits, those limits were subsequently altered and therefore the definition of "dwelling-house" in the Act of 1933 was altered.

Cur. adv. vult.

Dec. 18. SCOTT L.J. I will ask Tucker L.J. to read the judgment of the court.

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TUCKER L.J. read the following judgment in which after stating the facts set out above and reading the relevant portions of sch. I. of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, continued as follows: In *Sharpe v. Nicholls* (1), it was held by this court that personal representatives having no beneficial interest in the dwelling-house in question cannot avail themselves of the provisions of para. (h) of sch. I. to the Act of 1933. It follows that the trustees in the present case could not have obtained an order for possession if they were the only plaintiffs. Can they remedy this by joining Miss Marsh as plaintiff and was she properly joined? Under the will of the testatrix Miss Marsh had no right to compel the trustees to give her possession of the house. The trustees held the property under a trust for sale and conversion with power to postpone, and in the meantime, to permit Miss Marsh in their discretion during her life either to receive the net rents and profits or to have the use and enjoyment thereof and they were not bound to postpone the sale until after Miss Marsh's death. It is further to be observed that Miss Marsh was not a person with the sole beneficial interest, as the testatrix's niece Nora Kathleen Marsh, was ultimately entitled to the trust fund which included the proceeds of sale of this house.

Reliance was placed by counsel for the plaintiffs on the definition of " landlord " in s. 12, sub-s. 1, of the Act of 1920. It was contended for the defendant that the definition in that Act was inapplicable to the Act of 1933, since that Act itself has a definition section, viz. s. 16, which does not repeat the definition of " landlord " in the Act of 1920, and further s. 18 of the Act of 1933, which provides that the Act may be cited together with the principal Acts, does not say, as in the case of s. 4 of the Act of 1930, that the Act is to be construed as one with the principal Act. This matter was discussed by Morton L.J. in *Sharpe v. Nicholls* (2). We do not consider it necessary to decide this question because we are of opinion that Miss Marsh has no title to the premises and is not a person who is or would, but for the Act, be entitled to possession of the same. She is accordingly not within the definition. It is clear that neither the definition section of the Act of 1920 nor para. (h) of sch. I. to the Act of 1933 confer on anyone any right to an order for possession which he does not otherwise possess. Paragraph (h) is designed to relax in certain cases the previously

(1) [1945] K. B. 382.

(2) Ibid. 390.

imposed statutory restrictions on the right of recovery. In the present case Miss Marsh, apart from the Rent Restriction Acts, would not have been entitled to sue in ejectment. She was not a party to the lease and was not entitled to the reversion. There is nothing in para. (h) of sch. I. to the Act of 1933, enabling her to sue or be added as a plaintiff. As the proper plaintiffs, the trustees, cannot bring themselves within para. (h) and Miss Marsh cannot herself sue, it follows that no order for possession could properly be made in the present case.

A further point was taken on appeal to the effect that in any event there was no evidence on which the learned county court judge could hold that the granting of the order would not cause greater hardship than its refusal. There was, in our view, evidence upon which the judge could have found either way. It was a pure question of fact and there is nothing in this ground of appeal. In the result the appeal succeeds.

Appeal allowed.

Solicitors for plaintiffs : *Waller, Neale & Houlston, for Marsh & Ferryman, Worthing.*

Solicitors for defendant : *Jackson & Jackson for Harry D. Grey, Worthing.*

R. F. S.

NASH v. HIGH DUTY ALLOYS LIMITED.

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Factory—Machinery—Guard “necessarily removed for examination “lubrication or adjustment”—Injury to workman—Non-compliance with regulations—Exception not available to employers—Factories Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 67), s. 16—Operations at Unfenced Machinery Regulations, 1938 (St. R. O. 1938, No. 641), regs. 1, 2, 5.

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Jan. 13,
14, 15.

Lord Oaksey,
Tucker and
Cohen L.JJ.

The plaintiff was employed as an inspector of the output of certain machines, including a power press, in a factory. If he found the output defective, his duty was to have the machine adjusted by a tool-setter; he was forbidden to interfere with the machines himself. Finding the operation of the power press defective he called a tool-setter to adjust the dies. Difficulty was experienced in getting a correct adjustment, and the charge hand and a tool-maker were also sent for. A master-pressing (that is, one which had been tested and found accurate) was inserted in

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the machine, and the plaintiff was asked to inspect and see if he could "see daylight" between the pressing and the die—in which case the adjustment was not correct. For the purpose of inserting the dies and the master-pressing it was necessary to remove the guard with which the machine was provided, but the machine was not in motion. The plaintiff said he could "see daylight" and he was in the act of indicating with his left hand the precise point at which the fitting was not exact, when the tool-maker, for the purpose of removing the master-pressing (which could not be done by hand) depressed the pedal which started the machine, and the plaintiff's hand was caught by the downward stroke of the press, and seriously injured:—

Held, (1.) that s. 16 of the Act, and the exception provided by that section did not apply to machinery when not in motion, and therefore did not apply during the operation of removing and replacing the dies in the stationary machine, but only when Morgan set the machine in motion for the operation of removing the master-pressing. That operation could have been performed with the guard in position, and therefore it was not "necessarily removed" so as to bring the operation within the exception.

(2.) Even had the employers brought themselves *prima facie* within the exception, they could not have relied on it, because, though tool-setting operations are exempted from reg. 5 of the Operations at Unfenced Machinery Regulations, 1938, they are not thereby exempted from reg. 2, and the tool-setters and tool-maker (who were part of the class of machinery attendants) were not provided with individual certificates of appointment, defining the limits of their duties, as required by reg. 2, and therefore one of the conditions of the exception was not complied with.

APPEAL from Denning J.

The plaintiff, Alfred Nash, a man who had from an early age lost the use of his right hand, was employed by the defendants, High Duty Alloys, Ltd., as an inspector in their factory, his duty being to inspect the output of some thirty machines, and, if it was defective, to have the machines adjusted by the tool-setters. He was forbidden to interfere with the machines himself. On March 7, 1944, while on night duty, he noticed that a certain power press was producing defective pressings. This machine had two dies, of which the lower was fixed, while the upper was attached to a punch operated by an electric motor. The machine was provided with a guard comprising a gate so contrived that when the gate was open, the pedal which operated the power could not be depressed. But when it was necessary to get at the machine to adjust the dies, the whole guard could be raised out of the way, and then this safety device was out of action, and the machine could be set in motion by the pedal. The

plaintiff finding the pressings faulty, called a tool-setter named Barry, who adjusted the dies, but the result was still unsatisfactory, so the plaintiff made out a "rectification note" and went to his midnight meal while the machine was being attended to. On his return he was still dissatisfied, and Fisher, the charge hand of the tool-setters, and Morgan, a tool-maker were sent for; the lower die was taken out and attended to by the tool-makers. For these operations the guard was necessarily up. When the dies were replaced, a "master-pressing"—i.e., one which had been tested and found to be correct was placed on the die, and the plaintiff was asked by one of the others to "look for daylight," i.e. to see whether light was at any point visible between the die and the master-pressing, in which case the fitting was defective. He stooped down and looked from underneath, and said he saw daylight. During all these operations the machine was not in motion. He was just indicating with his left hand the precise spot where daylight was showing when Morgan depressed the pedal and started the power for the purpose of getting the master-pressing out, which could not be done by hand. The plaintiff's left hand was caught by the downward stroke of the press, and he lost the two middle fingers and sustained injury to the others. In an action based on negligence and breach of statutory duty, the defendants relied on s. 16 of the Factories Act, 1937 (1), and claimed that they came within

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(1) Factories Act, 1937, s. 14, sub-s. 1: "Every dangerous part of any machinery . . . shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced . . ."

Section 15: "In determining, for the purposes of the foregoing provisions of this Part of this Act, whether any part of machinery is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced—(a) no account shall be taken of any person carrying out, while the part of the machinery is in

"motion, an examination thereof or any lubrication or adjustment shown by such examination to be immediately necessary, being an examination, lubrication or adjustment which it is necessary to carry out while the part of machinery is in motion; Provided that this section shall only apply where the examination, lubrication or other operation is carried out by such persons, being male persons who have attained the age of eighteen, as may be specified in regulations made by the Secretary of State, and all such other conditions as may be so specified are complied with."

Section 16: "All fencing in other safeguards provided or

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the exception there provided, in that the machinery was "necessarily exposed for the purpose of examination . . . or adjustment." They also alleged contributory negligence. Denning J. held that the machinery was not "necessarily exposed" at the time of the accident, since the guard could have been replaced for the purpose of removing the master-pressing; he did not therefore find it necessary to decide the further point raised by the plaintiff that even if the defendants were within s. 16, they could not avail themselves of the exception, because they had not complied with reg. 2 of the Operations at Unfenced Machinery Regulations, 1938, in that the tool-setters had not been furnished with the certificates required by that regulation. He negatived contributory negligence and awarded the plaintiff 1,700*l.* damages. The defendants appealed.

"pursuance of the foregoing provisions of this Part of this Act shall be . . . constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use, except when any such parts are necessarily exposed for examination and for any lubrication or adjustment shown by such examination to be immediately necessary, and all such conditions as may be specified in regulations made by the Secretary of State are complied with."

The Operations at Unfenced Machinery Regulations, 1938, reg. 1: "Regulations 2 to 7 of these regulations shall apply to the following operations, namely," examinations, lubrication or adjustment in pursuance of s. 15 para. (a) and s. 16 of the Act of any part of machinery which is in motion and is not securely fenced . . . "Provided further that reg. 5 shall not apply to the setting up of a machine by a tool-setter or other skilled mechanic, being a male person who has attained the age of eighteen and whose duty

"it is to set up such machine."

Regulation 2: "One or more persons shall be appointed by the occupier of the factory, by signed entry in, or by certificate attached to the general register, to be machinery attendants to carry out operations to which this regulation applies, and any such appointment may be made for all such operations or may be limited to such only of those operations as may be specified in the entry or certificate. The occupier shall furnish to each person so appointed a certificate of his appointment, which certificate shall indicate the limitations (if any) specified as aforesaid."

Regulation 5: "No operation to which this regulation applies shall be carried out (a) except by a machinery attendant authorized as aforesaid to carry out the operation" . . . (b), (c) and (d) dealt with the wearing of close-fitting overalls, the presence of a second person in case of emergency, and the erection of barriers to prevent access by other persons during the operation.

H. I. Nelson K.C. and *Stuart Horner* for the defendants. The main question whether the defendants are liable for breach of statutory duty depends entirely on the construction of s. 16 of the Factories Act, 1937. Here Denning J. found that the parts were not necessarily exposed while the machinery was being moved for a moment to shift the master-pressing which had jammed. This gives s. 16 a very narrow construction. On a true view "necessarily exposed" refers to the whole examination or adjustment. Here the guard had to be removed to enable the faulty dies to be removed from the machine and put right. The removal of the guard having become necessary, that necessity extended over the whole adjustment and examination necessary to put the machine in order. The need to replace the guard only arose when the machine had been put in order and was going to be taken into use. This receives support from *The Operations at Unfenced Machinery Regulations, 1938*. The contrary view is very unpractical for it might involve replacing and removing the guard many times during a single operation. There is no direct authority but a few cases afford assistance: *Nicholls v. F. Austin (Leyton), Ltd.* (1); *Atkinson v. Baldwins, Ltd.* (2); *Coltness Iron Co. v. Sharp* (3).

A subsidiary question was whether the defendants lost the protection of the Act because the tool-setters had not got certificates as was said to be required by reg. 2. The men were registered but not provided with certificates. This was really unnecessary in regard to tool-setters and only applied to machinery attendants having regard to reg. 1. If a contrary view was taken, a question would arise as to the effect of s. 130, sub-s. 3 of the Act.

There remained the question of contributory negligence. The plaintiff was an inspector and he admitted that there was no reason for him to do anything in regard to the machine. The machine was in the hand of the tool-setters, and it was not for the plaintiff to put his hand within the ambit of operation; still less ought he to have done so without being sure that the tool-setters were not putting the machine in movement.

Beney K.C. and *Marven Everett* for the plaintiff. It is important to bring the true facts to the attention of the court,

(1) [1946] A. C. 493.

(3) [1937] 3 All E. R. 593.

(2) (1938) 158 L. T. 279.

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before it deals with the law. On the facts there were no adjustments going on on the machine. The dies on the machine having proved faulty, they were taken off and sent to the tool-makers to put in order. When brought back they were thought to be still faulty and the pressing was only put in by the tool-maker to show the correctness of his work. Therefore no adjustment was going on on the machine. Nor was it an examination. What really was going on was a testing. Section 16 of the Act contains the only exception to the duty to keep machines guarded. The legislation was intended to protect the factory worker, and the obligation to fence is absolute. The exception in s. 16 should be construed very narrowly, but the defendants are seeking to read a number of words into it. Neither s. 16 nor the exception apply at all except when the machinery is in motion ; in this case it did not begin to apply till Morgan put his foot on the pedal and started the machine. The question is whether at that moment the parts were necessarily exposed for examination. We must contend that the words " necessarily exposed for " examination " must mean " for examination when moving." If the factory inspector came along and found a machine with the guard up, but the machine not in motion, it is submitted that he could not prosecute, even though the power was connected, and could be switched on at any time.

Our case is that the insertion of the master-pressing was not within s. 16 because it was not necessary to put the machine in motion. The removal of the master-pressing was within the section, but not within the exception, because it was not necessary for the guard to be up. If we are wrong as to that, and if s. 16 does apply, it is a condition of the applicability of the exception that all the conditions have been complied with, whether they are necessary for the prevention of danger or not. Here the rule with regard to the giving of certificates to machinery attendants was wholly disregarded.

Nelson K.C. replied.

LORD OAKSEY L.J. This is an appeal from Denning J. in an action under the Factories Act. The case raises three points: (1.) Whether the machinery in question was " necessarily exposed " within the meaning of s. 16 of the Factories Act, 1937, for " examination, lubrication or adjustment " ; (2.) If it was, whether all the relevant regulations had been complied with ; (3.) whether the plaintiff was guilty

of contributory negligence. [His Lordship stated the facts and continued:] Denning J. held that there had been a breach of the provisions of s. 16 of the Act of 1937, and he decided the case on that ground, finding also that the plaintiff had not been guilty of contributory negligence. He found that the dangerous parts of the machine were not necessarily exposed for the purpose of examination or adjustment—lubrication did not arise—and he therefore found it unnecessary to deal with the further question whether all the conditions laid down by reg. 2 of the Operations at Unfenced Machinery Regulations, 1938, had been complied with. Morgan, Barry and Fisher had all been appointed under reg. 2 as machinery attendants, but they had not been furnished with certificates of appointment, indicating the limitations of their duties. Morgan was a tool-maker, and it is suggested by counsel for the plaintiff that it was improper for him to have been working on the job of tool-setting at the machine, his duties being in the tool-makers' shed, but there is nothing in that.

Mr. Nelson contends on the construction of s. 16 that this was really a tool-setting operation, and that the parts of the machine were necessarily exposed for the purpose of that tool-setting operation, and if so that it was not necessary to have the guard down. He reads the words "examination, lubrication and adjustment" as equivalent to a tool-setting operation, and as forming all one operation, and he says that if it was necessary to raise the guard for the purpose of that operation, it was not necessary to put it down while the operation continued. Mr. Beney and Mr. Everett contend that s. 16 in terms only applies to machinery in motion or in use, and that if the machinery is not in motion or in use, the adjustment can be made without guards without invoking the section at all. The exception equally applies only when the machinery is in motion or in use, and not to machinery which is stationary during the process of examination or adjustment. Therefore, they say, neither s. 16 nor the exception had any application in this case until the machinery was set in motion by Morgan, and that then it was not necessary for the guard to be removed.

In my opinion it was not in the least necessary that the parts that caused this accident should be exposed for the operation actually being done. Morgan was pushing out the master-pressing, and there was no necessity for the guard to

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be up. The plaintiff's interpretation is I think supported by s. 15, the words of which throw light on the similar words in s. 16, and show that the machinery must be in motion for the purposes of s. 16. I am in agreement with Denning J. as to the ratio on which he based his judgment.

I think I ought to express my view on the other points—certainly on contributory negligence, but also on the failure to issue certificates under reg. 2.

The argument for the defendants as to that is that Barry and Morgan are tool-setters, and that the second proviso to reg. 1 makes it unnecessary for the employer to register or issue certificates to tool-setters, because reg. 2 applies only to "machinery attendants." I think "machinery attendants" are a class of whom tool-setters form one part. They are exempted from reg. 5, but reg. 2 applies to tool-setters and other machinery attendants. It is argued for the defendants that because reg. 5 provides that "no operation to which this regulation applies shall be carried out except by a machinery attendant" and reg. 1 excludes setting-up operations from reg. 5, it is unnecessary for those engaged in such an operation to be in possession of certificates as machinery attendants. I am unable to accept that contention; if that had been the intention, it would have been said that "regs. 2 and 5 shall not apply." The effect of the proviso to reg. 1 is simply to make it unnecessary for tool-setters to observe the restrictions imposed by reg. 5—they need not have close-fitting one-piece overalls, or a second person standing by, and so forth. But reg. 2 applies to tool-setters equally with other machinery attendants.

Section 16 of the Act makes it abundantly clear that the regulations must be complied with, and if they are not, the exception cannot be relied on. It can only be relied on if the machinery is exposed for the purposes mentioned in the section, and if all the regulations are complied with. Here reg. 2 was not complied with, nor was the machinery necessarily exposed.

As to contributory negligence, I agree with Denning J. that it was not made out.

For these reasons I think the appeal should be dismissed.

TUCKER L.J. I agree. It is common ground that this machine was a dangerous machine within s. 14, or rather that the parts of the machine which caused the accident were

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dangerous ; it is also common ground that the defendants had provided a guard. [His Lordship read s. 16.] We have therefore a dangerous machine with a proper guard, and an obligation that the guard shall be constantly maintained and kept in position. When the accident happened the guard was not maintained, or in position, and the parts were in motion, so the defendants are at fault unless they can bring themselves within the words of the exception in s. 16—the onus is admittedly on them—that is, if they can show that this machine which was admittedly in motion, and admittedly exposed, was necessarily exposed. The final conclusion I have arrived at is that it is tolerably clear that these parts were not necessarily exposed. The process of tool-setting requires the removal of the dies, their adjustment in the tool-makers' shed, and their replacement in the machine. That does not require the parts to be in motion. No doubt it is usual to follow that process by a test to see whether the operation has been successful, and it may be customary to regard that as part of the operation, but it is in fact the ordinary working of the machine which could be done with the guard down.

The facts in the present case were very special. The use of the master-pressing was not part of the usual process of tool-setting, but the removal of the master-pressing did not necessarily require the parts to be exposed, it could quite well have been done with the guard down. The defendants have failed to bring themselves within s. 16, but supposing they had, that would not have been enough. They would still have to show that they had complied with all the conditions laid down by the regulations. It is common ground that reg. 2 had not been complied with ; it must be read with reg. 1 which says that "Regs. 2-7 shall apply "to examinations, lubrication or adjustment in "pursuance of s. 15, para. (a) or s. 16 of the Act of any part "of machinery which is in motion and is not securely fenced." But the second proviso to reg. 1 is what Mr. Nelson relies on. That merely says that reg. 5 shall not apply to the setting up of a machine by a tool-setter or other skilled mechanic. But although it refers to the machinery attendant there is nothing in the proviso to exclude reg. 2. Therefore even if he had brought himself within s. 16, he would still fail. This is not a mere technicality, because these stringent regulations are intended to provide for the safety of men who are obliged to work on dangerous machines with the guard up.

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I agree as to contributory negligence ; there was nothing to put the plaintiff on inquiry, or on his guard.

COHEN L.J. I agree, and only desire to add one word on the second point. I think the conclusion we have arrived at may be reinforced by s. 130, sub-s. 3, of the Factories Act, 1937, which provides : " If the occupier of a factory avails " himself of any special exception allowed by or under this " Act and fails to comply with any of the conditions attached " to the exception, he shall be deemed to have contravened " the provisions of this Act." The defendants are clearly availing themselves of an exception, and they have failed to carry out one condition, namely, that requiring them to issue certificates to certain machinery attendants, i.e., the tool-setters concerned in the case.

Appeal dismissed.

Solicitors for defendants : *Bell, Brodrick & Gray, for Pickavance & Heron, Barrow-in-Furness.*

Solicitors for plaintiff : *Barlow, Lyde & Gilbert.*

J. W. H.

*plied. FIRST NATIONAL HOUSING
ST, LTD. v. CHESTERFIELD R.D.C.
18] 2 All E.R. 658.*

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Jan. 17.

CROYDON CORPORATION v. THOMAS.

Lord Goddard
C.J., Humphreys
and Lewis JJ.

Local government—Requirement by council to supply dustbin—Notice to owner of premises—Appeal by owner to court of summary jurisdiction—Jurisdiction of justices to consider equities as between owner and occupier of premises—Public Health Act, 1936 (26 Geo. 5 and 1 Edw. 8, c. 49), s. 75, sub-s. 1.

Section 75, sub-s. 1, of the Public Health Act, 1936, gives power to any local authority who have undertaken the removal of household refuse within their district, to require the owner or occupier of any building within the district to provide suitable covered dustbins. A wide discretion is given to the authority in determining whether to place the burden on the owner or the occupier, but a right of appeal to a court of summary jurisdiction, entirely unrestricted in terms, is provided by the section for any person aggrieved by the requirement of the authority, and on such an appeal the justices are at liberty to consider the equities as between the owner and the occupier.

CASE STATED by Croydon justices.

On June 5, 1946, Miss M. E. Thomas, the owner of three

small houses at Croydon, received a notice from the corporation of Croydon, pursuant to s. 75 of the Public Health Act, 1936 (1), requiring her to provide, in respect of each of the premises "a portable, covered, galvanized iron dustbin, fitted with suitable handles, and being not more than thirty inches or less than twenty-two inches in height and not more than nineteen inches or less than seventeen inches in width." The said houses were subject to control under the Rent and Mortgage Interest Restrictions Acts and were let at weekly rents of 11s. 11½d., 14s. 9d. and 17s. 2d., respectively. In these circumstances, and having regard also to the fact that the cost of dustbins had risen from approximately 3s. 0d. to approximately 15s. 0d. each, Miss Thomas appealed to the Croydon county borough justices under s. 75, sub-s. 1, of the Act of 1936 (1), against the requirement of the local authority on the grounds (inter alia) that the said notices might lawfully have been served on the occupiers of the premises, instead of on her as owner, and that it would have been equitable for them to have been so served, inasmuch as dustbins were provided for the convenience of occupiers and dustmen and the necessity for renewal was due to the occupiers' lack of care in the use of them.

The justices allowed the appeal on the ground that the owner of the premises was justly aggrieved by the requirement, and because they considered there had been no proper exercise by the local authority of the discretion conferred by s. 75.

The corporation appealed.

Rowe K.C. and *Squibb* for corporation. The question is whether it is open to the justices on an appeal under s. 75 of the Public Health Act, 1936, against a requirement of a local authority, directed to the owner of premises, to consider the equities as between the owner and the occupier. It is submitted that it is not. Section 75 gives to the local authority what is a purely administrative discretion in the selection of the person

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| (1) Public Health Act, 1936,
s. 75, sub-s. 1: "A local authority
" who, as respects their district
" or any part thereof, have under-
" taken the removal of house refuse
" may by notice require the owner
" or occupier of any building
" within the district, or, as the
" case may be, within that part of
" the district, to provide such | " number of covered dustbins for
" the reception of house refuse of
" such material, size and con-
" struction as the authority may
" approve. . . ."
" Any person aggrieved by
" a requirement of the local
" authority under this subsection
" may appeal to a court of sum-
" mary jurisdiction." |
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to be required to supply the receptacle and the justices have no power to intervene unless there is some question of dishonesty in the selection. It is important to notice that in other sections of the Act, where an appeal is given to a court of summary jurisdiction, a right of appeal is specifically given on the question whether the owner or the occupier should be served (see ss. 45 and 290).

Crispin for the owner. Section 75 speaks for itself. It gives a right of appeal to any person aggrieved and the owner was clearly aggrieved by being required to provide these dustbins. [He was stopped.]

LORD GODDARD C.J.. This case raises a point which is not free from difficulty, but in my opinion the justices came to a correct decision. The words which we have to construe are to be found in sub-s. 1 of s. 75 of the Public Health Act, 1936, and are as follows: "Any person aggrieved by a requirement of the local authority under this sub-section may appeal to a court of summary jurisdiction." If you take the first part of sub-s. 1 alone, it appears to put the widest possible discretion, into the hands of the local authority. It appears to enable them, by administrative action, to require either the owner or the occupier to provide this dustbin. Accordingly, if the section remained without the addition of the words I have just read, it would seem reasonably clear that that was an administrative discretion given to an elected body, such as the corporation, with which no one could interfere. It is not a discretion, on the face of it, which requires to be exercised judicially; it is an administrative discretion. But when you find that any person aggrieved by a requirement of the local authority may appeal to a court of summary jurisdiction, it is obvious that Parliament intends the discretion which has been exercised by the local authority to be subject to an appeal, and the final determination, in the event of an appeal, is left to the justices and not to the local authority.

The facts in this case are that the owner of certain premises brought an appeal from the local authority, and in the first place she purported to appeal under another section in the Act, namely, s. 290, sub-s. 3. The provisions of that section and the particular machinery which is provided under it very largely form the substance of Mr. Rowe's argument in this case, that the justices had no jurisdiction to hear the complaint on the only ground which was submitted in this case, namely, that it

was not right that the burden of providing these dustbins should be thrown on the owner and not on the occupier. Section 290 applies only to matters which are contained in part XII. of the Public Health Act, except that there are certain sections in other parts of the Act (and s. 75 is not one of those) to which the provisions of s. 290 are specifically applied. Section 290 provides that a person served with a notice under that part of the Act "may appeal to a court of summary jurisdiction on any of the following grounds," and then it sets out the grounds upon which they can appeal. One of those grounds is: "That the notice might lawfully have been served on the occupier of the premises in question instead of on the owner, or on the owner instead of on the occupier and that it would have been equitable for it to have been so served." There you get a section which says that where a notice under one part of the Act may be served either on an owner or occupier, either the owner or the occupier, according as to which is served, can go to the court and say: "I ought not to have been served; it ought to have been served on the other person"; that is to say, if the owner is served, he or she can say it should be served on the occupier, and the occupier can say, on the other hand, it should be served on the owner. Because Parliament probably recognized, in passing that section, that it would involve the respective rights of owner and occupier, provision is made in the section itself for bringing in the other person who might be affected thereby; that is to say, if the owner says the notice ought to have been served on the occupier, provision is made for bringing the occupier before the court, and then the justices who form the court of appeal in this matter can decide, as between the owner and occupier, which is the proper person to be served. It is certainly to be remarked that in a section which is also in part II. of the Act, which deals with a matter somewhat akin to that with which s. 75 is concerned—s. 75 is dealing with dustbins and s. 45 with defective closets—there is a provision that in considering whether the owner or the occupier is to be required to repair a defective closet, the provisions of part XII., which includes s. 290, are to be applied. Therefore, if the question arises under s. 45 of the Act, whether it is the owner or the occupier, the justices can decide the matter.

I may say at once that one would rather expect that some provision of the kind would have been put in s. 75, but it has not been, and Mr. Rowe has argued, very forcibly, that that

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shows that the question as to who is to be served is to be left entirely to the local authority and is not one which the justices have power to decide ; that the only thing that the justices can decide, I suppose, is whether or not a dustbin is required, and whether or not the dimensions of the dustbin which one or other of these persons is required to provide is larger than is needed. There is a great deal to be said for the fact that unless Parliament meant that, you would have expected to find provisions similar to those in s. 290 incorporated in this section. We have to read s. 75 as it stands, and as it stands it is clear that it gives an unrestricted right of appeal. It says that any person aggrieved by a requirement of a local authority may appeal to a court of summary jurisdiction. The principal way in which a person can be aggrieved is by being called upon to provide this receptacle, and if an owner is called upon to do it and thinks that the occupier ought to do it, or thinks that under the terms of the lease between himself and the occupier the burden is thrown on the occupier, one cannot imagine any greater grievance than that. If he has a grievance he is entitled to appeal to the justices.

One thing which seems to me to be clear in this case is that the section does not purport in any way to vary the terms of the contract of tenancy or the lease between the landlord and tenant. Yet it is obvious that if the local authority can at their discretion throw the burden on one or other, without regard to anything more than that they think it is better to put it on one than the other, they may be very materially interfering with the contract of tenancy. If under the contract of tenancy there was an obligation to keep a dustbin in repair (because it need not be a movable dustbin ; it could be a receptacle which in some houses is part of the outside structure of the house), and if it was found to be out of repair, the burden, if there was a repairing lease, would fall on the tenant.

My reason for coming to the conclusion to which I have come is that a right of appeal, in terms entirely unrestricted, is given by s. 75. It is given to "any person aggrieved," and any person is aggrieved if he is ordered to do some work, or provide some receptacle, which ought to be done or supplied by the tenant. The justices have set out in this case their reasons. I may say, having read the facts that they find, that I am satisfied, if it was open to the justices to come to this conclusion, that no fault could be found with their decision. It seems to me to be a very reasonable decision in this particular case.

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They have given as one of their reasons that they were not satisfied that there had been a proper exercise by the local authority of the discretion conferred by s. 75. It is only necessary, I think, to say this. I do not think we need go into the question whether, if the local authority give a general direction, that is either necessarily a proper or necessarily an improper exercise of discretion; but as they are given a discretion under the Act to impose this burden on the owner or the occupier, and as in accordance with what we are now holding there is a right of appeal given to the owner against the order, it follows that the justices can certainly differ from the discretion which is given to the local authority. Mr. Rowe's whole argument was that that part of the decision was something which could not be attacked or reversed or considered by the justices. I have come to the conclusion that the words of the statute are too wide for that contention to prevail.

Accordingly, I think it was open to the justices to decide as they did. What the possible consequences of that decision may be, and how it will work out in the end, is something with which we are not concerned. In the circumstances I think this appeal fails and must be dismissed with costs.

HUMPHREYS J. I am of the same opinion. The justices state that the ground on which they allowed the appeal was that the appellant was justly aggrieved by the requirement of the local authority. Looking at the appeal section, it is about as wide and general as an appeal section can possibly be, as my Lord has pointed out. There is no restriction of any sort or kind on the appeal court to consider this question: Was the requirement of the local authority a proper one in the circumstances? I think they may consider any matter which is relevant which will enable them to decide that question. Obviously one of the matters in this case, and probably the only matter, which resulted in the appeal, was that the owner was saying: "You ought not to have required me—I am not interested in whether you should require somebody else or not—to provide this dustbin." I cannot see that there could have been any argument addressed to the court below limiting the discretion of that court, except that in certain other matters the Act has provided, in terms, that the justices shall consider such questions and shall bring, or may bring before them, or before the court of appeal, the other party. I do not think that argument is strong enough to prevent this court holding—

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and in this I agree with my Lord—that here is a case of a wide and unfettered discretion and the justices as an appeal court were authorized to consider, and were only doing their duty in considering, whether the right person had been required to provide this dustbin. I agree, therefore, that the appeal should be dismissed.

LEWIS J. I agree.

Appeal dismissed.

Solicitors for the corporation : *Sharpe, Pritchard & Co., for E. Taberner, Town Clerk, Croydon.*

Solicitor for house-owner : *A. Rawlence, Croydon.*

A. W. G.

1947

Jan. 20.

Lord Goddard
C.J., Humphreys
and Croom-
Johnson JJ.

REX v. EDWARDS AND OTHERS. *Ex parte* JOSEPH.

Housing—Building licence—Condition limiting price for sale—Offence—Registered land—Time and place of “sale”—Jurisdiction of justices—Building Materials and Housing Act, 1945 (9 & 10 Geo. 6, c. 20), s. 7, s. 9, sub-s. 3.

Where a house has been constructed on registered land under the authority of a licence granted subject to a condition limiting the price at which it may be sold, a person “sells” the house within the meaning of s. 7 of the Building Materials and Housing Act, 1945 (which makes it an offence to sell a house subject to such a condition at a price greater than the price so limited) at the time when and at the place where the purchase money is paid and the material documents are handed over, and not when the registration is completed at the Land Registry.

MOTION for order of prohibition.

The applicant was charged before the Essex justices sitting in the Becontree Division on two summonses charging him with having unlawfully sold a house, 228, Sheringham Avenue, East Ham, which was constructed under the authority of a licence granted subject to a condition limiting the price for which it might be sold, for a greater price than the price so limited, contrary to s. 7 of the Building Materials and Housing Act, 1945 (1).

(1) Building Materials and Housing Act, 1945, s. 7, sub-s. 1 :—
“Where a house has been constructed under the authority of a licence granted for the purposes of a Defence Regulation (herein-

“after referred to as ‘a building licence’) and the licence, whether granted before or after the passing of this Act, has been granted subject to any condition limiting the price for

The house in question was built on registered land. The negotiations for the sale were conducted in the county borough of East Ham and the contract for sale was signed in the same place. The purchase money was paid and the necessary documents were handed over to the purchaser's solicitor at a solicitor's office at Barking, and the transaction was then registered and a land registration certificate was issued by the Land Registry in Lincoln's Inn Fields.

The applicant contended that the justices of the Becontree Division had no jurisdiction to hear the summonses on the ground that the house was not sold within their jurisdiction but was only sold when the transaction was registered and the land registration certificate was issued by the Land Registry, and therefore that the summonses should have come before the stipendiary magistrate sitting at Bow Street.

The justices were of opinion that they had jurisdiction to hear the summonses and the applicant now sought an order of prohibition to prohibit them from proceeding on the summonses.

C. L. Henderson K.C. and *Frank Whitworth* for the applicant. The question is what is the meaning of the word "sells" in the Building Materials and Housing Act, 1945. A "sale" of land takes place at the time when and at the place where the title is made good and in the case of registered land the title is made good by registration in the Land Registry in London. Section 9, sub-s. 3, of the Act provides that for the purposes of that Act "a person sells a house if he sells or agrees to sell any "interest in the house." That definition is merely explanatory and not expansive. The word "sells" should be construed according to its strict technical meaning: see *New Plymouth Borough Council v. Taranaki Electric-Power Board* (1), where Lord Macmillan said: "But, as Lord Hewart C.J. said in a "recent case . . . : 'It ought to be the rule, and we are glad " 'to think that it is the rule, that words are used in an Act of " 'Parliament correctly and exactly, and not loosely and " 'inexactly.' " Registered land should therefore not be

" which the house may be sold or
" the rent at which it may be
" let, any person who, during the
" period of four years beginning
" with the passing of this Act, sells
" or offers to sell the house for a
" greater price than the price so

" limited . . . shall be liable . . . "

Section 9, sub-s. 3 :—" For
" the purposes of this Act—
" (a) a person sells a house if he
" sells or agrees to sell any
" interest in the house . . . "

(1) [1933] A. C. 680, 682.

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considered as sold within the meaning of the Act until the transfer of the registered estate is completed by the registrar entering on the register the transferee as the proprietor of the estate transferred: see s. 19 of the Land Registration Act, 1925.

Nelson K.C. and *Vernon Gattie* for the respondents. The sale of a house takes place on the payment of the purchase money. When that is paid the purchaser is entitled to go into possession and from that time onwards he is responsible for the property, even if the registration has not been completed. The court should give the word “sells” its plain and ordinary meaning. Sections 107 and 110 of the Land Registration Act, 1925, make it clear that a sale may be complete although not finally registered.

LORD GODDARD C.J. It is not suggested that the applicant in this case did not commit an offence, but for some reason he has an objection to being dealt with by the justices of the Becontree Division and prefers to be dealt with by the magistrate sitting at Bow Street. The question really is what the word “sell” means in the Building Materials and Housing Act, 1945. The object of that Act was to prevent people who obtained a licence under the Defence Regulations entitling them to use building materials in building a house and who were told by the licensing authority that if they were given that licence they must undertake not to sell the house for more than a certain sum of money, from selling the house in excess of the amount limited by the licence. In other words, the Act is designed to stop what sometimes may be inaccurately described as profiteering in houses.

Section 9 of the Act clearly shows that a person can commit an offence under the Act even if he agrees to sell the house, that is, if he has entered into a contract to sell the house, but has not perfected the matter. The whole of this case depends on when a person can be said to “sell” a house for the purpose of this Act, because the point is taken that as this was registered land, and therefore the sale had to be registered in the Land Registry and the land registration certificate issued, the sale was not complete until that was done. It is said that that is done at the Land Registry in Lincoln’s Inn Fields and therefore the offence, if any, was committed in Lincoln’s Inn Fields. In my opinion, that is not correct. In this case, the preliminary negotiations were conducted and the contract

of sale was signed in the county borough of East Ham, more than five hundred yards from the boundary of the Becontree Division, and so any proceedings in relation to the agreement to sell would have to be taken before the stipendiary magistrate at East Ham. But the completion, as that term is understood by conveyancers and others, took place at a solicitor's office at Barking. The money was paid there, and the necessary documents were there put into the possession of the purchaser's solicitor to enable him to get the transaction registered and the necessary certificate issued by the Land Registry. In my opinion, therefore, the sale took place at Barking, where the money was paid and where the completion took place. It seems to me that for the purposes of the Building Materials and Housing Act, 1945, we are not concerned with all the provisions of the Land Registration Act dealing with the registration of a completed transaction: all we have to see is where the sale took place. I am satisfied that the sale took place within the meaning of this section in the office at Barking, and that the justices came to the right conclusion when they said that they had jurisdiction. In my view, there is no ground for granting this application for a rule of prohibition and the application ought to be dismissed.

HUMPHREYS J. I agree and have nothing to add.

CROOM-JOHNSON J. I agree for the reasons already given.

Rule discharged.

Solicitors for applicant: *Kingsford, Dorman & Co., for Hatten, Asplin, Jewers & Glenny, Barking.*

Solicitors for respondents: *Duthie, Hart & Duthie.*

H. A. P.

OUZMAN *v.* KENNEDY.

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Dec. 16.

Landlord and tenant—Tenancy agreement—Covenant by tenant not to sublet—Proviso for re-entry by landlord—Subletting of rooms in house by tenant—Action by landlord in county court for possession—Subsequent application by tenant to local authority to register accommodation available for tenants or lodgers—Refusal of local authority to register—Action by tenant in High Court against local

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authority for mandamus—Application by tenant for postponement of county court action—County court—Grant of postponement—Discretion of county court judge—Defence (General) Regulations, 1939, reg. 68CB (St. R. & O. 1945, No. 1452), dated November 16, 1945.

A landlord let a house on a three-years tenancy agreement at a rent of 70*l.* per annum, the agreement contained a covenant by the tenant that she would use and keep the premises as a private dwelling-house only and that she would not sublet the premises or any part thereof. The tenancy agreement also contained a proviso for re-entry in the event of any breach of covenant by the tenant. The landlord commenced an action in the county court claiming possession alleging that the tenant had committed breaches of her covenant by subletting parts of the demised premises. The tenant subsequently applied to the local authority, in whose area the premises were situated, under reg. 68CB of the Defence (General) Regulations, 1939, to register living accommodation in the house occupied by her which she was willing to make available for occupation by tenants or lodgers. The regulation was made subsequently to the alleged breaches of covenant by the tenant. The local authority refused to register the accommodation in the premises occupied by the tenant who thereupon commenced an action in the High Court against the local authority for a mandamus directing them to register the premises pursuant to the regulation. The tenant then applied to the county court judge for a postponement of the landlord's action for possession pending the decision of the action in the High Court. The county court judge granted the application. On an appeal by the landlord :—

Held, that the county court judge had exercised his discretion wrongfully in granting the postponement of the county court action, and that there was no ground in law justifying him in adjourning the claim for possession pending the result of the mandamus proceedings in the High Court. The question of the rights of the two parties to the tenancy agreement as they existed at the commencement of the landlord's action, should be tried out by the county court judge without regard to any possible proceedings under the Defence Regulations.

Regulation 68CB of the Defence (General) Regulations, 1939, does not have a retrospective effect, and, therefore, a claim by a landlord for possession of a dwelling-house on the ground of the tenant's breaches of covenant in her tenancy agreement previous to the commencement of such action, ought to be decided by the county court judge according to the rights of the parties at the time the landlord's action for possession was commenced, notwithstanding that the tenant subsequently applied to the local authority under reg. 68CB to register living accommodation in the house she occupied which she was willing to make available for occupation by tenants or lodgers.

APPEAL from Brentford county court.

On August 21, 1940, the plaintiff, Mr. Ouzman, let a house

within the area of the Chiswick Borough Council to the defendant, Mrs. Kennedy, for a term of three years from May 27, 1940, at a yearly rent of 70*l.*, payable by monthly instalments in advance. By the agreement the tenant covenanted to keep and use the premises as a private dwelling-house only, and she also undertook that she would not, without the written consent of the landlord, assign, underlet, sublet, or otherwise part with possession of the premises or any part thereof. The tenancy agreement also contained a proviso for re-entry in the event of any breach of covenant by the tenant. On the expiration of the agreement the tenant held over subject to the terms of the agreement.

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The landlord alleged that the tenant during the term of the tenancy agreement had committed serious breaches of covenant, the breaches alleged being that the tenant had converted the premises into flats and had sublet them to several tenants who were occupying the whole of the house in breach of the covenant. The landlord, on June 6, 1946, commenced proceedings in the county court against the tenant claiming possession of the premises by reason of the tenant's breaches of covenant. The defence of the tenant was a denial of the plaintiff's allegations, an alternative of waiver, and in the further alternative an application for relief against forfeiture.

On June 27, 1946, the tenant applied to the Chiswick Borough Council, the authority under the regulations, for registration under the Defence (General) Regulations, 1939, reg. 68CB in respect of premises in their area (1). The town clerk

(1) By the Defence (General) Regulations, 1939 reg. 68CB, para. 1: (St. R. & O. 1945, No. 1452), dated November 16, 1945, "Where a local housing authority have established a register for the purposes of this regulation, any person having in any dwelling in the area of the authority occupied by him living accommodation which he is willing to make available, whether with or without furniture for use therein, for occupation by tenants or lodgers, may apply to the authority for registration of the accommodation and of the terms on

" which the householder is willing
 " to make it available as aforesaid.
 " Paragraph 2. On application
 " being made under the last foregoing paragraph the local
 " housing authority shall, if they
 " are satisfied that the accommodation is, or will be rendered,
 " suitable for occupation as
 " aforesaid and approve the said
 " terms, enter the accommodation
 " and terms in the register . . .
 " Provided that the authority
 " shall not be required to register
 " any accommodation, and may
 " cancel the registration of any
 " accommodation, if it appears to
 " them that it would be likely to

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on July 3, 1946, after having looked into the matter, wrote a letter to the tenant's solicitor, saying that the housing and town planning committee had no power to act in the matter, and that their recommendation could not become effective until the meeting of the council. Later in the month he wrote saying (*inter alia*) that he had considered the matter very carefully and had come to the conclusion that the order for registration could not be made, because if the order were made it would enable the regulation to be used either (a) to prevent the application of the Rent Restriction Acts to an existing letting, or (b) to regularize a breach of contract committed before the registration of the premises.

The tenant then commenced proceedings in the High Court against the Chiswick Borough Council for a mandamus directing them to register these premises pursuant to this regulation and alternatively, for a "declaration that the defendants are empowered by the said regulation to register the said accommodation pursuant thereto." The landlord was not a party to those proceedings. It was a friendly action and the facts and questions of law were set out in a special case (1).

The tenant then made an application on July 15, 1946, for an adjournment of the action in the county court pending the

"be made available for occupation
"as aforesaid without being regis-
"tered under this regulation.

"Paragraph 3: The registration
" . . . shall be cancelled on the
"application of the person for the
"time being entitled, subject to
"the rights over the accom-
"modation of any tenant or lodger
"to occupy the dwelling
"in which it is comprised . . .

"Paragraph 4. While accom-
"modation is registered for the
"purposes of this regulation, it
"shall be lawful, notwithstanding
"any provision to the contrary
"in any lease or tenancy or in
"any covenant, contract or under-
"taking relating to the use to be
"made of any land, and notwith-
"standing any restriction imposed
"by or under any enactment, for
"the accommodation to be made
"available for occupation, and to
"be occupied, as aforesaid in

"accordance with the registered
"terms and conditions."

(1) The action of *Kennedy v. Chiswick Borough Council* was tried before Morris J. on December 18, 1946, when that learned judge entered judgment for the defendants. He held that an occupier of a house who had already sublet rooms in the house she occupied did not come within para. 1 of reg. 68CB as being a person having living accommodation which she is willing to make available for occupation by tenants or lodgers, and that therefore the local authority were right in refusing to register the accommodation. He thought that the application to register the accommodation was not made bona fide, but in order to defeat the claim of her landlord.

decision of the action in the High Court. The deputy county court judge granted an adjournment on the ground that if he made an order for possession of the premises it would be a nullity if the High Court granted the application for a mandamus.

The landlord appealed.

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H. Harris for the landlord. The order of the deputy county court judge in granting the defendant's application for a postponement of the plaintiff's action for possession of the premises was wrong. At the time regulation 68CB was made and the defendant applied to the local authority to register the accommodation in the house she occupied and which she said she was willing to make available for occupation by tenants or lodgers, she had already sublet the house out in flats in breach of her covenant, and the landlord had a vested right to retake possession of the premises under the proviso for re-entry in the defendant's agreement of tenancy, and this right of re-entry the subsequent registration of the premises under the reg. 68CB the registration could not take away. The application made by the defendant to the local authority to register the accommodation she was willing to make available for occupation by tenants or lodgers was not made bona fide, but merely to defeat the plaintiff's claim for possession owing to her breach of covenant. Among the facts set out in the special case in the action brought by the defendant against the local authority for a mandamus was a statement that the defendant had decided to go to Australia and was only waiting for her passage. This showed that her application for registration under reg. 68CB was not made bona fide but merely to defeat the plaintiff's claim for possession. Regulation 68CB could not affect the landlord's accrued right of forfeiture by reason of the tenant's breach of covenant because it is not expressed to be retrospective in its operation; it therefore, could not apply to a case where an action had been commenced to recover possession of premises for breach of covenant committed prior to the making of the regulation—*National Real Estate & Finance Co. v. Hassan* (1).

Stephen Murray for the tenant. The county court judge was entitled to make the order postponing the hearing of the plaintiff's action for possession, because an action had been commenced by the tenant in the High Court against the local

(1) [1939] 2 K. B. 61.

C. A. authority for a mandamus to compel them to accede to her application and register the available accommodation in the house she occupied. If the High Court judge granted the mandamus any order which the county court judge might make for possession would be a nullity.

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SCOTT L.J. This is an appeal from a decision of a county court judge in an action by a landlord for possession of a house against the sitting tenant. In the course of that action and before trial, the judge was asked by the tenant to make an order adjourning the trial generally. The judge made that order, and this appeal is by the landlord against it. Ordinarily an order made by a county court judge in regard to the conduct of proceedings is a matter within the judge's discretion, and this court is very slow to interfere with the exercise of his discretion, but in this case a question of principle of great importance is involved, and, in our view, it was transgressed by the judge.

[The learned lord justice then stated the facts of the case relevant to this question, and read reg. 68CB of the Defence (General) Regulations, 1939, and continued :] The issues to be tried in the county court were whether the tenant had committed breaches of her covenant in her tenancy agreement, thereby entitling the landlord to re-enter, secondly, whether there had been a waiver by the landlord of those breaches, and thirdly, whether the tenant was entitled to relief against forfeiture. As the application for adjournment was made before the county court judge had investigated the question on its merits, we must assume for this purpose that the claim of the landlord was well founded. The application by the tenant for the adjournment was made in a manner and in circumstances which, in my view, show that it was a tactical manoeuvre made to obtain an indirect advantage out of emergency legislation. The breaches in question in the action were the sub-letting to several tenants who were occupying the house in breach of the tenant's covenant. The tenant's object in obtaining the adjournment was to go to the registration authority, obtain an order for registration of living accommodation which she as the occupier of the house was willing to make available for occupation by tenants or lodgers, and obtain the advantages, as it was supposed by the tenant, of those provisions. The town clerk of the local authority, the Chiswick Borough Council, wrote to the tenant's solicitor that he had considered the matter very carefully and had come to the conclusion that the order for registration could not be made.

His reasons for so thinking were that, if the order were made, it would enable the regulation to be used either (a) to prevent the application of the Rent Restriction Acts to an existing letting, or (b) to regularize a breach of contract committed before the registration of the premises. I think that the town clerk expressed the law correctly. Paragraph 4 of the regulation, in my opinion, makes it clear that it is not intended to be retrospective because it says: "While accommodation is registered" various things may be done. That presupposes that registration will already have been effected, and lawfully effected, and thereupon makes provision for the powers to be conferred as a result of registration. Even without that paragraph, I should have been disposed to hold that the registration was not intended to act retrospectively in regard to any accrued right of action, such as that of a landlord arising on the breach of a covenant which gives him a right of re-entry.

Quite clearly the application for registration was not a matter which the judge ought to have treated as relevant to the application before him, and that is sufficient reason in itself for saying that he ought not to have made the order appealed from. It is essential, I think, that the question of the rights of the two parties to the tenancy agreement then existing should be tried out by the county court judge without regard to any possible proceedings under the Defence Regulations. I express no opinion in regard to the operation of the Defence Regulation should any application be made hereafter, but, in my view, it was wrong to anticipate any result of that particular application for registration. We were asked to say that the judge's order directing an adjournment was right simply because of the proceedings which were then already pending to obtain registration. In my view whatever might be the result of a registration if and when properly effected, the first step to be taken was to ascertain what were then the rights of the parties before the county court. For these reasons I think that the order should be set aside with costs, here and below.

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TUCKER L.J. I agree. I think the county court judge erred as a matter of law in granting this adjournment. Were it not so we should have had no authority to interfere with the exercise of his discretion, provided that no injustice had manifestly been done thereby. The error of law was that he clearly considered that, if the local authority did register these premises, he would be precluded from giving effect on the trial

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of this action to the landlord's claim to forfeit this lease. I think that in coming to that conclusion he was wrong. I express no opinion with regard to the power or duty of the local authority to register these premises. Proceedings with regard to that are pending in the Special Paper, but this landlord had started an action at common law claiming forfeiture of the lease on the ground of breach of covenant. In my view, he was entitled to have that issue decided as a matter of law by the competent tribunal, and there is nothing in the Defence (General) Regulations, reg. 68CB, which can affect one way or another the proper rights with regard to the forfeiture of this lease as between the landlord and tenant. I am expressing no opinion about the position of any sub-tenants there may be in the premises or the precise nature of the order which the county court judge might make if he decided the issue of forfeiture in favour of the landlord, but I have no doubt that the landlord is entitled to have that matter decided by a court of law in an action which he had commenced before this regulation was made and before any application to register had been made to the local authority. It is to be observed, furthermore, that when the application to adjourn the trial was made to the county court judge, an application to register had in fact been made to the local authority and had been refused. That is a matter which is, I think, of some significance, but despite that refusal, the county court judge was asked to adjourn the trial of the landlord's action pending an application to the High Court for a mandamus to compel the local authority to reverse the decision at which they had already arrived. As I say that application is pending, and I express no views with regard to the probability of its success or otherwise, but I would make this observation with regard to those proceedings which I hope will be brought to the notice of the court which tries that case. The pleadings have been shown to us. It is an action by way of writ against the local authority, Chiswick Borough Council, claiming a mandamus directing them to register these premises pursuant to this regulation, and, alternatively, for "a declaration that the defendants are empowered by the said regulation to register the said accommodation pursuant thereto." That is an action between the tenant in the present appeal and the local authority, and the landlord in this action, Mr. Ouzman, is not a party to those proceedings. We are told that the case is what is called a friendly action to decide the rights of the parties, and that the facts and

questions of law have been set out in an agreed case pursuant to Or. 34, r. 1, of the Rules of the Supreme Court. The result is that the judge is going to be asked to deal with this matter without Mr. Ouzman, who is interested in the matter, being heard. If application had been made to the Divisional Court for an order of mandamus, provision would have been made under Or. 59, r. 5, of the Rules of Supreme Court (1) for the service of the notice of motion on parties interested. [His Lordship read the rule and continued:] So that under the mandamus procedure before the Divisional Court ample provision is made for seeing that all parties who may be interested in the mandamus or certiorari, or other order, are before the court, but the present proceedings have been framed in such a way that, apparently, Mr. Ouzman will not be heard. I only mention that matter that it may be brought to the notice of the judge in considering that action when it does come on for trial. Apart altogether from those proceedings, I am of opinion that there was no ground in law which justified the county court judge in adjourning this claim for possession pending the result of these mandamus proceedings.

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COHEN L.J. I entirely agree with what has fallen from my brethren, but as we are differing from the county court judge on a matter which is one of discretion, I will state my reasons in my own words. If the landlord establishes the fact, pleaded in his particulars of claim, that he had, before reg. 68CB, was enacted, a vested right of action in respect of breaches of covenant against subletting, that vested right, it is conceded, was unaffected by the regulation. I express no opinion about what will be the relief to which the landlord will be entitled in the county court proceedings when they are heard if he establishes the facts on which they are based, but, in the circumstances, I am unable to see how the county court judge could properly come to the conclusion that any order made by him in the county court proceedings would be made a nullity by any order that a judge hearing the special case might make.

(1) R. S. C. Or. 59, r. 5 (3.): "under the foregoing provisions of
 " If on the hearing of the motion " this rule, the court or judge
 " or summons the court or judge " may adjourn the hearing, in
 " is of opinion that any person " order that the notice or summons
 " who ought to have been served " may be served on that person,
 " therewith has not been served, " upon such terms (if any) as the
 " whether or not he is a person " court or judge may direct."
 " who ought to have been served

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That, however, we are told, is the reason for his decision to grant an adjournment. On the contrary, it might well be (though here again, I am not expressing any concluded opinion on a point which the judge who hears the special case will have to decide), that the judge hearing that special case may consider it desirable that the facts in dispute in the county court proceedings should be ascertained before the special case is disposed of. It must be remarked that an application under para. 1 of reg. 68CB must be made by the person having living accommodation which could be made available for tenants or lodgers, but if the landlord succeeds in the county court action, the tenant will have forfeited any right to the living accommodation which she seeks to register. For these reasons, in addition to those given by my brethren, I agree that this appeal should be allowed.

Appeal allowed.

Solicitors for landlord : *Chapman-Walkers.*
Solicitors for tenant : *R. Raymond Pollard & Co.*

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Housing—County council’s order for compulsory purchase of house and grounds—For residence of police superintendent with emoluments of 800l. a year—County police force “paid” by county council—Power to make order—Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 51), s. 97.

By s. 97 of the Housing Act, 1936, a county council is granted power to acquire compulsorily houses for “persons employed or “paid by . . . the council.”

The class of such persons is not confined to members of the working classes, and a member of the county police force, though not employed by, is paid by, the county council.

Accordingly, a county council, acting under the section, can provide a residence for a member of that force, a superintendent, with emoluments of 800l. a year.

MOTION to quash a compulsory purchase order.

On February 7, 1946, the Lancashire County Council made an order for the compulsory requisition of “a plot of land” (freehold) “containing 2.982 acres at New Longton together “with the dwelling-house known as ‘The Laund,’ New Longton, and other buildings erected thereon.” The order was

made to provide a residence for a police superintendent who is in charge of communications in the area and the residence to be acquired was regarded by the council as highly convenient, since it was closely adjacent to police headquarters. The residence was vacant and the applicants, being the executors of the late owner-occupier, were about to sell the property by auction. The applicants objected to the order. The Minister of Health directed an inquiry and, thereafter, on July 2, 1946 confirmed the order. In the course of the inquiry it was indicated that houses for police purposes could, if necessary, in the future be erected on the land purchased with the house, and that a tentative plan for the erection of seven pairs of houses had been prepared.

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Willink K.C. and *Somerville* for applicants. This compulsory purchase order, confirmed by the Minister, was not within the powers conferred on the county council by part V of the Housing Act, 1936 for two reasons. Firstly, s. 97 (1) is a section in part V of which the heading is:—"Provision of "Housing Accommodation for the Working Classes," and s. 97 is the first section under the sub-heading: "Miscellaneous." These headings are a part of the Act of Parliament and may be regarded as preambles to the sections covered by them. See Halsbury's Laws of England (2nd ed.), vol. 31, at p. 464, where the statement is made that a heading may be read not only as explaining the sections, which follow, but as affording an even better key to the general construction than a mere preamble. The local authority for the purposes of the Act are the council of the borough, urban or rural district. See s. 1, sub-s. 1. As to the powers of the local authority in the provision of accommodation and the acquiring of land for the working classes, see, ss. 72, 73 and 74 (1). The compulsory purchase

(1) By s. 97 of the Housing Act, 1936: "A county council . . . shall have power to provide houses for persons employed or paid by, or by a statutory committee of, the council . . . and for that purpose may be authorized to acquire or appropriate land in like manner as a local authority may be authorized to acquire or appropriate land for the purposes of

"this part of this Act." By s. 74, sub-s. 2: "A local authority may, with the consent of and subject to any conditions imposed by the Minister, acquire land for the purposes of this Part of this Act, notwithstanding that the land is not immediately required for those purposes: Provided that a local authority shall not be authorized to purchase any

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order states specifically that it is made under s. 74. "Working
"classes" are not defined for the purposes of the Act,
but only for the purpose of the Eleventh Schedule, by par. 11
of that schedule. Section 97 gives county councils and mental
hospital boards power to provide houses for persons employed
or paid by them, and "for that purpose may be authorized
"to acquire or appropriate land in like manner as a local
"authority may be authorized to acquire or appropriate land
"for the purposes of this part of the Act," i.e., for the housing
of the working classes. The local authority for the purposes
of the Act could not acquire land compulsorily for
this police officer with emoluments of 800*l.* a year
nor can the county council since he is not a member
of the working classes. It is plain that the persons employed
or paid by the county council for whom houses may be provided
by that council were those for whom houses may be provided
under part V of the Act, namely, members of the working
classes. There is no reported case showing that land has been
acquired under part V of this Act for police purposes, and the
provisions of s. 97 of the Housing Act, 1936, were not then new.
(See s. 72 of the Housing Act, 1925 and s. 8 of the Housing,
Town Planning, etc., Act, 1919.)

Secondly, this police officer was not employed or paid by the
county council or by a statutory committee of the council. The
standing joint committee is not a statutory committee of the
council, since there are members on it who are not members of
the county council. (Having referred to ss. 1, 2, 3, 4, 6 and 23
of the County Police Act, 1839 "for the establishment of county
"and district constables by the authority of justices of the
"peace"; the County Police Act, 1940, by s. 3 of which
justices in quarter sessions were to make a police rate, and by
s. 12 of which station houses and stores rooms were to be
provided by the justices; The County and Borough Police
Act, 1856; ss. 1, 3, 8, 9, 24 (repealed by the Local Government
Act, 1929, Twelfth Schedule, part VI.), 30, 65, 75, prov. 16 (f)

"land compulsorily for those pur- "poses unless it appears to the "Minister that it is likely to "be required for those purposes "within ten years from the date "on which he confirms the com- "pulsory purchase order."	"acquisition for the purposes of "this Part" (Part V) "of this "Act of any land . . . which "at the date of the compulsory "purchase order forms part of "any park, garden or pleasure "ground, or is otherwise required "for the amenity or convenience "of any house."
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By s. 75: "Nothing in the Act
"shall authorize the compulsory

of the Local Government Act, 1888; s. 33 and the Third Schedule of the Police Act, 1890; s. 4 of the Police Act, 1919, and ss. 157, 159, 160 and 181 of the Local Government Act, 1933, he continued :) The dyarchy between a county council and the standing joint committee under the Local Government Act, 1888, as to the maintenance of buildings for assizes and sessions or for the use of police or clerks to justices, was resolved in *Ex parte The Somerset County Council* (1), where it was held that the standing joint committee had control. Mathew J. said, speaking of the standing joint committee (2): "Their duty is to say what expenditure shall be required, and then, upon requisition, the county council are to supply the funds, and it is the duty of the county council to obey the requisition made." Cave J. said (3): "with the solitary exception of having the privilege of paying the bills, it seems to me that the council have nothing to do with the buildings . . . required." It is clear that a county police force is paid by the standing joint committee at the rates laid down from time to time by the Secretary of State and that the amount required is obtained from the police fund which is part of the county fund. The police fund remains as a genuine fund, since by s. 22 of the Police Pensions Act, 1921, payment of pensions are directed to be made out of the police fund, and, by that Act, it is the police authority who make the payments. See also ss. 3, 4, 14 and 18 of that Act. The police authority in a county is the standing joint committee (see s. 33 of, and the third schedule to, the Police Act, 1890). It is plain from the Police Pensions Act, 1921, that this Lancashire police superintendent was neither employed by, nor paid by, the county council. He was paid by the police authority, set up by s. 30 of the Local Government Act, 1888—the standing joint committee—though, no doubt, by sub-s. 3 of s. 30, that expenditure was met out of the county fund, provided by the county council. The standing joint committee have a statutory duty to comply with the regulations laid down by the Secretary of State as to pay. In making these payments they merely indent on the county fund. The power to provide a residence for a constable was not transferred to the standing joint committee under the Local Government Act, 1888, but apparently, apart from the relevant provisions of the Local Government Act, 1933, remained with the justices in quarter sessions. The

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(1) (1889) 58 L. J. (Q. B.) 513. (3) Ibid. 516.

(2) Ibid. 515.

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power in s. 65 of the Local Government Act, 1888, for the county council to acquire lands for their powers and duties, executed through the standing joint committee, is permissive. There are ample powers for the provision of residences for police officers in statutes other than part V of the Housing Act, 1936; the powers under that part of that Act are confined to provisions for the accommodation of the working classes. The status of a police officer was considered by McCardie J. in *Fisher v. Oldham Corporation* (1), and a member of a county police force cannot be said in the full sense to be employed by the standing joint committee since a constable holds office under the Crown (see *Lewis v. Cattle* (2)), but by virtue of statute he is paid by them, since they are the police authority and not the county council.

Lastly, the county council had no power to acquire compulsorily the land other than the residence itself, since the minister had not recorded or recited that this land was likely to be required for police purposes within ten years. See s. 74, sub-s. 2, of the Housing Act, 1936. The order does not state how the land is to be used for the accommodation of the working classes within the next ten years.

H. L. Parker for the minister. Section 97 of the Housing Act, 1936, can be invoked to acquire compulsorily a house for any person employed or paid by the county council. There is no restriction of this class to such of these persons as are members of the working classes. The last words of the section merely deal with the manner in which authority to acquire land is given implying a reference to s. 74, and the first and second schedules, thus attracting compulsory order procedure. Compare the terms of s. 98 by which a railway and certain other companies may provide houses for the accommodation of persons of the working classes employed by them. The applicants rely on the heading to part V of the Act, which may be considered as in the nature of a preamble, but this can only be invoked in the case of ambiguity and here there is no ambiguity. See Maxwell on Interpretation of Statutes (9th ed.), at p. 54. A preamble cannot restrict or extend the scope of a statute, if the words of the statute are clear and not in doubt. Under s. 80, also in part V, the local authority can provide buildings or land which in the opinion of the minister, will serve a beneficial purpose in connexion with the requirements of the persons for whom the housing accommodation is provided, e.g., a residence for a medical man.

(1) [1930] 2 K. B. 364.

(2) [1938] 2 K. B. 454.

Secondly, I admit that a constable is a servant of the Crown and that the standing joint committee is not a statutory committee of the council. The county police force are paid by the county council, and so this superintendent of police comes within the class mentioned in s. 97. By the last words of sub-s. 3 of s. 30, of the Local Government Act, 1888, police, expenditure as the joint committee determine "shall be paid out of the county fund and the council of the county shall provide for such payment accordingly." A separate account is required to be kept for the police, being a special county purpose. See s. 181 of the Local Government Act, 1933. As Mathew J. said in *Ex parte The Somerset County Council* (1) it is the duty of the standing joint committee to say what expenditure shall be required, and then, upon requisition, "the county council are to supply the funds, and it is the duty of the county council to obey the requisition made," and Cave J. pointed out (2) that "the county council alone has the power to raise money, and to pay that money when it has been raised." In *Ex parte Leicestershire County Council* (3) Hawkins J. said (4), obiter: "The administrative duty of making and assessing the rates for the maintenance of the police force, and of directing the application and expenditure of them is, in my opinion, vested under the new Act"—the Local Government Act, 1888—"in the county council." In *Glamorgan Coal Co., Ltd. v. Glamorganshire Standing Joint Committee* (5) an action to recover the expenses of housing and feeding extra police brought into the county from other counties and boroughs to cope with strike disturbances, Pickford L.J. and Bray J. held that the standing joint committee were rightly sued, the county council being properly joined as parties since they were the persons who would have to pay the amount found due and against whom an order for payment might be necessary. See the judgments of Pickford L.J. (6) and of Bray J. (7) [Morris J. Whom could a constable sue for his pay?] Probably he could not sue; but possibly he could sue the standing joint committee and the county council on a special footing by virtue of statutory obligation plus a certain degree of contract and relationship. See the judgment of McCardie J. in *Foster v. Oldham Corporation* (8). There are no statutory provisions dealing with

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| (1) 58 L. J. (Q. B.) 515. | (5) [1916] 2 K. B. 206. |
| (2) Ibid. 516. | (6) Ibid. 232. |
| (3) [1891] 1 Q. B. 53. | (7) Ibid. 240-242. |
| (4) Ibid. 56. | (8) [1930] 2 K. B. 364, 376. |

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payments by a standing joint committee, or establishing a treasurer for them or providing for an audit of any payments to be made by them.

Referring to the words of s. 97, the words are "employed or paid by" the county council. It is difficult to think of any others than the police who, though not employed, are paid by the county council. These words are exactly appropriate to the county police force. The persons referred to by the section must be paid for services and for services rendered to others than the county council or they would be employed by the county council. The Police Pensions Act, 1921, cannot by the language used in it, override the general statutory provision of s. 30, sub-s. 3, of the Local Government Act, 1888.

The county council was right in acquiring the residence with the curtilage, drive and garden land previously used with it. See s. 75 of the Housing Act, 1936.

Willink K.C. replied.

MORRIS J. The contention of the applicants is that the order, which the minister has confirmed, is not within the powers conferred by part V of the Housing Act, 1936. Two main submissions are urged. In the first place, it is said that s. 97 of the Housing Act, 1936, does not give authority to a county council to acquire a house for someone in the position and with the status of a police superintendent. In the second place it is said that s. 97 cannot be invoked, for the reason that members of a county police force are not employed or paid either by the county council, or by a statutory committee of the county council. No argument was addressed to the court in support of a ground raised in the notice of motion, namely, that the consent of the Minister of Health should have been obtained before the county council made their compulsory purchase order. It was, however, additionally submitted that the Minister ought not in any event to have authorized the acquisition of more than the residence itself, and that the Minister had not recorded or recited that it appeared to him likely that the land acquired would be needed within a period of ten years. In the course of the inquiry directed by the Minister, it was indicated that houses for police purposes could, if necessary, be erected on the land in future. A tentative plan for the erection of seven pairs of houses had been prepared. In my view, there is no validity in this additional submission. The land being acquired is no more than what was regarded as

the land in which the house stood, and which normally would pass with the house upon a sale. In this connexion it is to be observed that s. 75 of the Housing Act, 1936, provides as follows [his Lordship read the section]. The land being taken does not appear to be more extensive than the land which was regarded by the late owner-occupier as being the park or garden of the house, or as being land required for the amenity of the house. In these circumstances, no question arises as to land being taken which is not immediately required, and the project of building further houses for police occupation on the land in the future need not be considered. The residence is now needed, and the property to be acquired does not consist of any greater quantity of land than can reasonably be regarded as the land in which the residence stands.

I pass therefore to consider the two main arguments which were presented on behalf of the applicants. In support of the first of these, attention was directed to the fact that s. 97 appears in part V. of the Housing Act, 1936, and it was urged that the powers under s. 97 only apply where property is being acquired for the housing of the working classes. The evidence showed that the salary and allowances of the superintendent in question amounted to 800*l.* per annum. The heading of part V of the Housing Act, 1936, is as follows: "Provision of Housing Accommodation for the Working Classes. *General Powers and Duties of Local Authorities.*" The Act does not contain a definition of the phrase "working classes" other than in the eleventh schedule, para. 11, where the phrase is defined to include "mechanics, artisans, labourers, "and others working for wages, hawkers, costermongers, "persons not working for wages, but working at some trade or "handicraft without employing others, except members of "their own family, and persons other than domestic servants "whose income in any case does not exceed an average of 3*l.* a "week, and the families of any of such persons who may be "residing with them." That definition is, however, laid down for the purposes of the eleventh schedule. As an effort in selectiveness, the phrase "working classes" appears to me to be neither happy nor precise. It does not seem that the superintendent comes within the grouping designated by the phrase, and on behalf of the Minister of Health, it was not so suggested.

His Lordship having read s. 97, continued: The section, and others which follow it, appear under the sub-heading

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"Miscellaneous," and under the general heading of part V., the terms of which I have read. These headings may be regarded as preambles to the sections appearing under them. See Maxwell on Interpretation of Statutes, (9th ed.), at p. 54. As such they may form a guide to intention where words admit of doubt or ambiguity. See Maxwell at p. 46, where the following passage occurs: "The preamble of a statute has been said to be a good means of finding out its meaning, and, as it were, a key to the understanding of it; and, as it usually states, or professes to state, the general object and intention of the legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt." See also Halsbury's Laws of England, (2nd ed.) vol. 31, p. 464, where the following passage occurs: "Headings . . . frequently precede clauses of enactments, or *fasciculi* of clauses, applicable to special objects. They govern, and may generally be read before, each of the sections which are ranged under them. They are to be regarded as parts of the statute itself, and may be read not only as explaining the sections which immediately follow, but as affording an even better key to the general construction than a mere preamble. Further, as being found and sometimes referred to in the enacting parts, they are deserving of greater consideration than marginal notes. The clear meaning and natural operation of words found in the various sections under headings must, however, according to the general rule, not be restrained or confined by them."

It has, therefore, to be considered whether there is doubt or ambiguity as to the meaning and construction of s. 97. The section begins by giving power to provide houses for certain persons, and then provides that for such purpose of providing houses, there is to be authority to acquire land in like manner as a local authority may be authorized to acquire land for the purposes of part V of the Act. The latter part of the section is, in my view, dealing with the manner in which authority to acquire land is given, and is not dealing with the question as to the persons for whom houses may be provided. The earlier part of the section deals with this. The persons are those who are "employed or paid by, or by a statutory committee of, the council." These words are in my view clear, and the persons designated are defined by such words. There is no

limitation, so as to confine the persons to persons of the working class who are employed or paid by, or by a statutory committee, of the council. A reading of s. 98 of the Act shows how such a limitation could have been imposed if such had been the intention. In my judgment, therefore, the persons for whom houses may be provided, if they are otherwise within the statutory designation, need not be persons of the working class.

I pass now to a consideration of the second main submission of the applicants, which concerns the question whether members of a county police force are employed or paid, either by a county council or by a statutory committee of a county council. On behalf of the Minister, it was not sought to argue that a member of a county police force is employed by a county council or is either employed or paid by a statutory committee of a county council. It is not, therefore, necessary to consider the status of the members of such a force, though it may usefully be noted that in *Lewis v. Cattle* (1) it was held that: "A police officer, whether he be a member of the Metropolitan Police Force or a member of the police force of a county, city or borough, holds the office of constable and as such is a 'person who holds office under His Majesty' within the Official Secrets Act, 1911." In *Fisher v. Oldham Corporation* (2), McCardie J. had occasion to consider the position of police officers in a borough, and he held that "The police appointed by the watch committee of a borough corporation, if they arrest and detain a person unlawfully, do not act as the servants or agents of the corporation so as to render that body liable to an action for false imprisonment." In connexion with the part of the case with which I am about to deal, it is to be observed that in his judgment, McCardie J. said (3): "Only in a special and limited sense can a police officer be said to be in the employ of a municipal corporation. With respect to the action for 'wages,' as they are called in that case" (*Wallwork v. Fielding* (4))—"and I do not forget schedule five of the Municipal Corporations Act—I think the point may well be raised some day whether any such action will lie in so far as it is framed upon an alleged contract of service in the ordinary sense. Any such action may perhaps be more properly brought on a special footing—namely, on the duty of the defendants to pay such sum as is due by virtue of statutory

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(1) [1938] 2 K. B. 454. (3) Ibid. 376.

(2) [1930] 2 K. B. 364. (4) [1922] 2 K. B. 66.

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"obligation plus a certain degree of contractual relationship." The learned judge goes on to refer to the decisions recorded in Lumley's Public Health, vol. 1 (9th ed.), pp. 450 and 451, and also to *Hall v. Taylor* (1).

It now becomes necessary to consider the position as regards the payment of members of a county police force. The County Police Act, 1839, provided that it should be lawful for the justices assembled in general or quarter session with the consent of one of Her Majesty's principal Secretaries of State, to increase or diminish the number of constables first appointed under such Act for their county. The Act provided that a principal Secretary of State might make rules for the government, pay, clothing, and accoutrements and necessities of the constables, and that such rules should be binding on all persons whom they might concern. By its various provisions, the Act dealt with the establishment of county and district constables by the authority of justices of the peace. This Act was followed in 1840 by the County Police Act of that year, which enabled justices to make a police rate, and which otherwise dealt with the powers of justices in general or quarter session in regard to county police.

The Local Government Act, 1888, under which county councils were established, contains provisions of great consequence as affecting the matter now under consideration. By s. 3 of that Act it was provided: "There shall be transferred
 "to the council of each county on and after the appointed day,
 "the administrative business of the justices of the county in
 "quarter sessions assembled, that is to say, all business done
 "by the quarter sessions or any committee appointed by the
 "quarter sessions, in respect of the several matters following," then are set out a number of matters, and it is sufficient for present purposes to refer to the first four of them. The first is in these terms: "The making, assessing, and levying of
 "county, police, hundred, and all rates, and the application
 "and expenditure thereof, and the making of orders for the
 "payment of sums payable out of any such rate or out of the
 "county stock or county fund, and the preparation and
 "revision of the basis or standard for the county rate." The second was "the borrowing of money," the third, "the passing
 "of the accounts of and the discharge of the county treasurer," and the fourth: "Shire halls, county halls, assize courts,
 "judges' lodgings, lock-up houses, court houses, justices'
 (1) (1858) E. B. & E. 107.

“rooms, police stations, and county buildings, works, and property, subject as to the use of buildings by the quarter sessions and the justices to the provisions of this Act respecting the joint committee of quarter sessions and the county council.” Section 8 dealt with the reservation of business to quarter sessions, and by s. 9 it was provided by sub-s. (1.) as follows: “The powers, duties and liabilities of quarter sessions and of justices out of session with respect to the county police shall, on and after the appointed day, vest in and attach to the quarter sessions and the county council jointly, and be exercised and discharged through the standing joint committee of the quarter sessions and county council appointed as hereinafter mentioned.”

Section 30 provided for the setting up of the standing joint committee. Sub-section 1 is in these terms: “For the purpose of the police, and the clerk of the peace, and of clerks of the justices, and joint officers, and of matters required to be determined jointly by the quarter sessions and the council of a county, there shall be a standing joint committee of the quarter sessions and the county council, consisting of such equal number of justices appointed by the quarter sessions and of members of the county council appointed by that council as may from time to time be arranged between the quarter sessions and the council, and in default of arrangement such number taken equally from the quarter sessions and the council as may be directed by a secretary of state.” Sub-section 2 deals with the election of a chairman, and then in sub-s. 3, it is provided that: “Any matter arising under this Act with respect to the police, or to the clerk of the peace, or to clerks of the justices, or to officers who serve both the quarter sessions or justices and the county council, or to the provision of accommodation for the quarter sessions or justices out of session or to the use by them or the police or the said clerks of any buildings, rooms, or premises,” and so on, “and any other matter requiring to be determined jointly by the quarter sessions and county council,” all those matters it is provided are to “be referred to and determined by the joint committee under this section.” Then I quote the concluding words of sub-s. 3: “and all such expenditure as the said joint committee determine to be required for the purposes of the matters above in this section mentioned, shall be paid out of the county fund, and the council of the county shall provide for such payment accordingly.”

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Attention must necessarily be closely directed to the concluding words of sub-s. 3, which I have just read, the words providing that expenditure as determined to be required by the standing joint committee shall be paid out of the county fund, and that the county council shall provide for such payment. It is clear that a standing joint committee, though a statutory committee, is not a statutory committee of a county council. As its name clearly denotes, and as its constitution shows, it is a joint committee of justices appointed by quarter sessions and of members of the county council appointed by the council. Certain statutory enactments call for mention. The Police Act, 1890, made provision respecting the pensions, allowances and gratuities of police constables. The provisions of s. 33 and of the third schedule of that Act show that in a county, the police authority is recognized to be the standing joint committee, and that the police fund is the county fund. The Police Act, 1919, under which the police federation was established, provided by s. 4 that the Secretary of State might make regulations as to the government, mutual aid, pay, allowances, pensions, clothing, expenses and conditions of service of the members of all police forces within England and Wales, and that every police authority should comply with the regulations so made. This section is analogous to s. 3 of the Act of 1839, though in 1919 the matters to be dealt with in regulations were wider in scope than in 1839. Such matters included, for example, pensions, which were not mentioned in 1839. The Act of 1839 had provided that the regulations of the Secretary of State should be binding on all persons whom they might concern. In 1839 such persons would include the justices: in 1919 the standing joint committee had in a county become the police authority, and every police authority is, by the terms; of the Act of 1919, required to comply with the regulations.

It is submitted on behalf of the applicants that the conclusion to be drawn is that police are paid by the police authority, and that in a county, this payment comes out of the county fund. It is submitted that the police authority determine what expenditure is required, and, so to speak, indent on the county fund, but that they have a statutory duty to comply with regulations as to pay, and that therefore payments to police for their services ought properly to be regarded as made by the police authority, and that it would not be correct to say that police in a county are paid by the county council. It was agreed by both sides that the words "paid by" in s. 97 of the

Housing Act, 1936, following as they do the words "employed" or "must reasonably be read as referring to payment for services. In support of their contentions, the applicants referred to the various provisions of the Police Pensions Act, 1921, in which occur such phrases as "in receipt of a pension from a police authority" and "pension, allowance and gratuity payable by a police authority."

On behalf of the Minister, it was submitted that since police in a county are paid out of the county fund, it is correct to say that they are paid by the county council. It was pointed out that there are no statutory provisions dealing with payments by a standing joint committee, or establishing a treasurer for them, or providing for an audit of any payments to be made by them. Attention was called to ss. 182, 183 and 184 of the Local Government Act, 1933, as well as to the provisions of s. 181 dealing with a county fund. Sub-section 1 is in these terms: "All receipts of a county council, whether for general or special county purposes, shall be carried to the county fund, and all liabilities falling to be discharged by the council, whether for general or special county purposes, shall be discharged out of that fund." Sub-section 2 provides: "Separate accounts shall be kept of receipts carried to, and payments made out of, the county fund (a) for general county purposes; (b) for each special county purpose, except that, where as respects any two or more special county purposes the part of the county chargeable is the same, one separate account may be kept as respects both or all of those purposes; and the account for general county purposes shall be called the general county account, and an account for any special county purpose shall be called a special county account." Section 184, sub-s. 1, is in these terms: "All payments to and out of the county fund shall be made to and by the county treasurer."

On a consideration of the various statutory provisions, the view that I have formed is that it is correct and appropriate to say that members of a county police force are persons who are paid by the county council concerned. The expenditure which their service involves must be paid out of the county fund, and the payment must be made by the county treasurer. It is, in my view, the county council who are paying. The statutory direction that every police authority must comply with regulations to be made by the Secretary of State, and that such regulations may deal with a number of topics, including that of pay, does not purport to enact that the police are to be paid by

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the police authority. The position remains, in my view, that county police are paid out of the county fund, and that payments out of that fund must be made by the county treasurer. I must give effect to this view which I have formed unless there are any authorities which have laid down a contrary view. I pass, therefore, to consider certain cases which are in point. After the passing of the Act of 1888, the question arose in Somerset whether it was the county council or the standing joint committee who had control of buildings and premises for the accommodation of quarter sessions or justices out of session, or for the use of the police or clerks to justices. The question was submitted to the Queen's Bench Division, where it was decided that it was the standing joint committee that had control. The matter is reported under the name *Ex parte The Somerset County Council* (1). In the course of his judgment Mathew J. used these words (2): "They are, therefore, to have complete control, as it seems to me, of the questions arising within the meaning of the section, 'and all such expenditure as the said joint committee determine to be required for the purposes of the matters above in this section mentioned shall be paid out of the county fund, and the council of the county shall provide for such payment accordingly'"—the learned judge was there quoting from the Act. He then went on to use these words: "Their duty is to say what expenditure shall be required, and then, upon requisition, the county council are to supply the funds, and it is the duty of the county council to obey the requisition made." Cave J. in his judgment, used these words (3): "All questions arising with regard to them, or with respect to anything incidental to them, are to be determined by the standing joint committee, and not by the county council, and that, with regard to all such matters, the only thing which the county council have to do is to pay the bill, and that, as I understand, necessarily because the county council alone has the power to raise money, and to pay that money when it has been raised. But, with the solitary exception of having the privilege of paying the bills, it seems to me that the council have nothing to do with the buildings or rooms or premises which are required."

In *Ex parte The Leicestershire County Council* (4), it was decided that the control over the division of a county into police

(1) 58 L. J. (Q. B.) 513.

(3) Ibid. 516.

(2) Ibid. 515.

(4) [1891] 1 Q. B. 53.

districts is vested in the standing joint committee of the county. Hawkins J. is reported as follows: he referred to s. 3 of the Act of 1888, then he referred to s. 9, and went on (1): "I have given the matter attentive consideration, and I have come to the conclusion that the effect of this section is to give the standing joint committee control over the division of the county into police districts. The payment of the county police is one thing, the distribution of the county police into districts is another. The administrative duty of making and assessing the rates for the maintenance of the police force, and of directing the application and expenditure of them is, in my opinion, vested under the new Act in the county council, and the control of the division of the county into police districts is vested in the standing joint committee." What the learned judge said about payment was doubtless said obiter, but it is reasonable to read his words as showing that he did not consider that the county police were being paid by the standing joint committee.

In *Glamorgan Coal Co., Ltd. v. Glamorganshire Standing Joint Committee and Others* (2), the question concerned the liability of the standing joint committee to pay for the expenses of housing and feeding certain additional police brought from outside to assist the county police. The housing accommodation and the meals supplied had been provided by the plaintiffs at the request of the chief constable. The county council was sued as well as the standing joint committee. No question, however, arose in regard to the payment of the police. It was held in that case by the majority in the Court of Appeal "that the standing joint committee had power to enter into the contracts so as to bind themselves, and that they were therefore rightly sued upon them, the county council being properly joined as parties to the action as they were the persons who would have to pay the amount found due and against whom an order for payment might be necessary." The order made by the Court of Appeal was in these terms (3): "Allow the appeal; vary order of the court below. Decide in favour of the plaintiffs against the defendants, the standing joint committee and the county council, on the questions of liability raised on the pleadings so far as these relate to police other than metropolitan police, and against the plaintiffs and in favour of the said defendants so far as these questions

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(1) [1891] 1 Q. B. 56. (3) Ibid. 225.

(2) [1916] 2 K. B. 206.

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“relate to the metropolitan police. Declare that the defendants the standing joint committee are liable for the expenditure incurred by the plaintiffs as in the pleadings mentioned in respect of the police other than the metropolitan police, but not in respect of the metropolitan police. Refer the claim of the plaintiffs to an official referee, unless otherwise arranged, to ascertain the true amount thereof. Direct judgment to be entered in favour of the plaintiffs against the said defendants for the amount when ascertained. Order that the costs in the court below be plaintiffs’ in any event”—the remainder deals with costs.

I think it is helpful to read a passage in the judgment of Pickford L.J. He said (1): “This only leaves the question whether under the statutes the standing joint committee or the county council can be sued upon the agreements made by the chief constable. If, as I think, he had created an obligation upon the county to pay, the question of whether it can be enforced by action or otherwise is purely technical, and would, I think, never have been raised but for the fact that the defendants were unwilling to pay for the untenable reason which I have already mentioned. Still, if it is a good point, they are entitled to the benefit of it. The standing joint committee is a statutory body, and its duties and liabilities are in substitution for those of the justices before the Local Government Act of 1888. Before that Act the justices under various statutes, chiefly the County Police Act, 1839, and the County and Borough Police Act, 1856, were the police authority, and were charged with the duty of supporting the police force. In order to discharge this duty they could and did make contracts for buildings, clothing, etc., for police purposes, and by s. 2 of 21 & 22 Vict., ch. 92, except where otherwise provided for, contracts were made on their behalf by the clerk of the peace, and he could sue or be sued upon them, payment being made out of the county fund. In 1888 the Local Government Act, s. 9, transferred these powers, duties and liabilities to the quarter sessions and county council jointly to be exercised by the standing joint committee”—then the lord justice refers to s. 30, and goes on—“It seems to me that if the duties and liabilities which required the making of contracts before are transferred to the standing joint committee there must be implied a power of contracting, and this is consistent with s. 25 of the Police

(1) [1916] 2 K. B. 231.

“ Act, 1890, which gives them the power of making a particular
 “ kind of contract. It cannot, I think, be a correct con-
 “ struction of this legislation that the standing joint committee
 “ had no power of contracting except in the one instance
 “ mentioned in that Act. It was necessary to give them that
 “ power expressly, because it extended beyond the support of
 “ their own police.” Then he proceeded as follows : “ A more
 “ difficult question is who is bound by a contract made by
 “ them. They are not an incorporated body, and it could not
 “ have been intended that the members should be personally
 “ liable, and they have no seal under which they can contract
 “ when a seal is required. In ordinary cases no difficulty
 “ arises. The standing joint committee indent, so to speak,
 “ for what they want, and the necessary contract is made by
 “ the county council, who cannot object to the requirements
 “ of the standing joint committee, but there is no provision in
 “ the Acts that the county council shall be a party to all
 “ their contracts as the clerk of the peace was a party to those
 “ of the justices. I think that the agreements mentioned in
 “ s. 25 are intended to be contracts of the standing joint
 “ committee on their own behalf and not as agents for the
 “ county council, and if that be so I think that this section,
 “ considered in connexion with the latter part of s. 30 of the
 “ Local Government Act, 1888, points to all contracts made by
 “ the standing joint committee being their contracts, payment
 “ for which is to be made by the county council. I think that
 “ when the standing joint committee made a contract, by
 “ doing so, they determined the proper expenditure under that
 “ contract, which must be ascertained in case of dispute by the
 “ ordinary tribunals to be necessary expenditure, and the county
 “ council must pay it, but that the contract remained that of
 “ the standing joint committee. The question is not, in my
 “ opinion, very important, as the same result is obtained in
 “ each case, and the only difference is that the form of recovery
 “ is by means of a declaration that the standing joint committee
 “ are liable for the amount and an order on the county council
 “ to pay it instead of by means of a direct judgment against
 “ the county council.”

I think reference may also usefully be made to the judgment
 of Bray J. (1). I will read just two sentences ; the learned
 judge said : “ I think the judgment should declare that the
 “ standing joint committee are liable to pay all the claims of

(1) [1916] 2 K. B. 241-2.

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" both plaintiffs in respect of all the police other than the
 " metropolitan police (subject to the inquiry as to the items)
 " and that they are not liable to pay the claims in respect of
 " the metropolitan police. As regards the county council,
 " they were in my opinion proper parties to this action for
 " two reasons: one because they, as the paymasters, are the
 " persons really interested, and the other because I think that
 " the plaintiffs are entitled to an order that the county council
 " should pay to the plaintiffs the sums for which the standing
 " joint committee are found to be liable." In my view, this
 case, though not dealing with any question of the payment to
 be made to members of the police force in respect of their
 services, tends to support the view which I have expressed.

For the reasons which I have given, I consider that the
 superintendent was, and is, a person paid by the Lancashire
 county council, who, therefore, have power to provide a house
 for him. The Minister, in confirming the acquisition order,
 did not overstep his powers. In my judgment, therefore, this
 application fails.

Motion dismissed.

Solicitors for applicants: *Bird & Bird, for T. H. & T.
 Dodd & Buckley, Preston.*

Solicitor for Minister: *Solicitor to Ministry of Health.*

C. G. M.

1946
 Dec. 16.

I.T.P. (LONDON), LIMITED AND OTHERS v.
 WINSTANLEY.

Lord Goddard
 C.J., Humphreys
 and Lewis JJ.

*Gaming—Football pool—Conducting prize competition "in connexion
 " with any trade or business"—Betting and Lotteries Act, 1934
 (24 & 25 Geo. 5, c. 58), s. 26, sub-s. 1 (a).*

The proprietors of a newsagent's and tobacconist's business
 entered into an agreement with the promoters of football pools to
 display in their shop notices that they had for sale coupons for the
 said pools. In return for so doing they were to be allowed to keep
 the pennies charged for the coupons and were to receive from the
 pools promoters 1s. 6d. for every "client" who sent in the coupons
 bought at their shop. A police constable having purchased
 coupons, the promoters were charged before a court of summary
 jurisdiction, under s. 26, sub-s. 1, of the Betting and Lotteries Act,
 1934, with unlawfully conducting, in connexion with the business
 of a newsagent and tobacconist, a competition in which prizes

were offered for forecasts of the results of future events, and the shopkeepers were charged with aiding and abetting the offence. The justices convicted in each case. On appeal :—

Held, that the words of s. 26 were not apt to create the offence said to have been committed in the present case, for they imported some nexus between the carrying on of the competition and the trade or business in some connexion with which it was alleged to be carried on, and the convictions must be quashed.

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CASE stated by Liverpool justices.

At a court of summary jurisdiction sitting at Dale Street, in the city of Liverpool, an information was preferred by Herbert Winstanley, chief constable, under s. 26, sub-s. 1 (a) of the Betting and Lotteries Act, 1934 (1), against I.T.P. (London), Ltd., for that they on January 14, 1946, and on other days thereafter, did unlawfully conduct in connexion with the business of a newsagent and tobacconist, a competition in which prizes were offered for forecasts of the results of future events, namely, football matches. George and Mary Bourne, who conducted the newsagent and tobacconist business in question, were also charged with aiding and abetting the alleged offence.

At the hearing of the informations it was proved or admitted that on January 16, 1946, a police constable purchased at the Bournes' shop in Scotland Road, Liverpool, two coupons, an addressed envelope, and other printed matter, for I.T.P. pools, for the sum of 1d.; that on January 14 the following were displayed at the shop (1.) a notice chalked on a board reading "I.T.P. coupons 1d. each," (2.) a display card indicating that coupons for I.T.P. pools were on sale in the shop, (3.) a handwritten notice in blue crayon to the same effect, and (4.) a printed order form on which it was stated that the season subscription rate for coupons was one shilling. The Bournes, in return for displaying the coupons, were allowed to keep the pennies charged for the coupons and were also paid 1s. 6d. for every "client" who sent in the coupons bought at their shop.

The justices found that the charges had been proved, fined

(1) Betting and Lotteries Act, 1934, s. 26, sub-s. 1: "It shall be unlawful to conduct in or through any newspaper, or in connexion with any trade or business or the sale of any article to the public—(a) any competition in which prizes are offered for forecasts of the result of a future event, or of a past event the result of which is not yet ascertained or not generally known."

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I.T.P. (London), Ltd., 10l., with 6l. 2s. costs, and fined the Bournes 2l. each. The defendants appealed.

Beyfus K.C., and *James Amphlett* for the appellants. Section 22 of the Betting and Lotteries Act, 1934, shows that this case is infinitely remote from the mischief at which the Act was aimed. It is very difficult to give an exact definition of what is meant by carrying on one business in connexion with another, but it must connote either some person carrying on two businesses in association, or two persons carrying on their respective businesses in association as a sort of joint venture. It would be wrong to say that A. is carrying on business in connexion with the business of B. merely because he employs B. in respect of some subsidiary operation. At the present day practically no business could be conducted successfully unless those conducting it employed others conducting other businesses for subsidiary purposes. Unlike lotteries and prize competitions, which are dealt with in s. 22, football pools are not prohibited, but it is impossible to conduct them without employing printers to print the coupons and the Postmaster General to carry them. If the finding of the justices stands, and an offence has been committed in this case, it was equally an offence to ask a printer to print the coupons and for the printer to print them. Section 26 is a penal section and being ambiguous must be construed in favour of the accused.

Basil Nield K.C. and *Gilbert Steel* for the respondent. The justices came to a correct decision. Where you have a commercial agreement under which the I.T.P. uses the tobacconist shop for the purposes of its pool business, and for reward to the tobacconist, the connexion is one which is envisaged by the statute. In this case there was a joint venture, because the Bournes would have benefited by the increased sale of coupons.

LORD GODDARD C.J. This is a case stated by a court of summary jurisdiction for the city of Liverpool, before whom the company, I.T.P. (London), Ltd., who are promoters of football pools, were summoned for a breach of s. 26 (1.) (a) of the Betting and Lotteries Act, 1934, for having unlawfully conducted in connexion with a business of newsagent and tobacconist a certain competition in which prizes were offered for forecasting football results. The circumstances stated by

the justices showed that when it became unlawful, under the Control of Paper (Economy) Order No. 45, to supply coupons for football competitions without making any charge for them and it was provided that you could only supply people with coupons for entering into these competitions on payment of not less than a halfpenny, the promoters of this competition entered into an agreement with a man and his wife W¹⁰, in fact, carried on a newsagent's and tobacconist's shop in Liverpool. Under that agreement, they were to advertise the coupons, or at any rate they were to sell coupons for a penny each and they were allowed to keep the penny which they got, and they were also promised eighteen pence commission for every customer who bought a coupon and entered the football pool. It is to be observed that the Bournes, that is, the shopkeeper and his wife, were charged with aiding and abetting but were not charged with committing the offence because, obviously, the Bournes were not conducting the competition, but it is said that I.T.P., Ltd., committed the offence of conducting their competition in connexion with a trade or business. The section simply contains those words. It does not say what connexion there should be with any trade or business and, as I said before, when one has to construe an Act which is altering the law one is entitled in the words of Lord Lindley in *Thomson v. Clanmorris* (1), to have regard "not only to the words used, but to the history of the "Act, and the reasons which led to its being passed. You "must look at the mischief which had to be cured as well as "at the cure provided."

I think the history of the Act and the mischief which has to be cured are quite within the memory of all of us. Before the Act it was quite a common thing, not only in connexion with the sale of articles but in respect of other matters too, for people who were carrying on a trade or business to offer prizes for a competition as an encouragement to people to do business with them. That was regarded, I suppose, as being something in the nature of a lottery or, at any rate, to be undesirable, and it was prohibited. Here it is said that I.T.P. were conducting their competition in connexion with the trade or business of the Bournes. It so happens that the principals are carrying on a business, but the Act does not say "in connexion with any person who carries on a trade or business." The Act says "in connexion with any trade

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“ or business ” and there must be some nexus, as it seems to me, between the carrying on of the competition and the trade or business in respect of which it is said to have been carried on in some connexion. At any rate, whatever may have been the intention, if there is a doubt about the matter one must always, with a penal section, construe it in favour of the subject. If the draftsman has not made his intention clear, an accused person must be given the benefit of that and it must be held that there is no offence.

One thing which naturally weighs with me very much is the difference between this section and s. 22 in the same part of the Act, which deals with lotteries and prize competitions, because when dealing with a lottery the most elaborate provisions are inserted as to what is prohibited. The printing of any tickets is prohibited, and so also is the distribution or offering or advertising for sale or distribution of any tickets. In this case, Mr. Beyfus has pointed out, and to my mind it is a perfectly sound contention, that if there has been an offence here it was equally an offence to ask a printer to print the coupons, because the printing of the coupons was no doubt a necessary part of conducting one of these competitions. You cannot conduct these competitions without having printed coupons. It seems to me to be extravagant, in those circumstances, to say that the printer might be penalized, or a person who is conducting a competition of this sort might be penalized, if he got coupons printed, though it would be equally in connexion with the business of a printer.

Parliament has not thought fit to prohibit these football pools. Many people think they ought to do so, others think they ought not to interfere with the recreations of the populace. However that may be, I cannot say that I think these words are at all apt to create the offence which is said to have been committed here and, in my opinion, the appeal should be allowed.

HUMPHREYS J. I agree.

LEWIS J. I agree.

Appeal allowed. Conviction quashed.

Solicitors for appellant : *Amphlett & Co.*

Solicitor for respondent : *W. H. Baines, Town Clerk, Liverpool.*

A. W. G.

JORDAN v. MAY.

C. A.

Landlord and tenant — Fixtures — Chattels — Electric light plant — Engine bolted to base—Storage batteries on table—Whether part of land.

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Jan. 13, 14.

Morton,
Bucknill and
Asquith L.JJ.

Demised premises included a shed containing an electric lighting plant consisting of an engine and dynamo bolted to a concrete base and of storage batteries standing on a table and connected on the one hand to the dynamo and on the other to the wiring system of the premises. Light was provided by the batteries, which were kept charged by the engine and dynamo as required. The lease included a covenant by the tenant to keep the plant in repair. The premises were requisitioned during the currency of the lease, and in consequence the batteries seriously deteriorated. The tenant being protected by s. 1, sub-s. 1, of the Landlord and Tenant (Requisitioned Land) Act against claims by the landlord for breach of covenant "in respect of any damage to the land occurring during" the period of requisition, the question arose whether the batteries were a fixture and so part of the land :—

Held, that the engine and the batteries were separate parts of the plant notwithstanding that they were connected by wires, and that the batteries, though necessary to the effective functioning of the plant, were not an essential or integral part of the engine, and were accordingly not a fixture.

Pole-Carew v. Western Counties & General Manure Co., Ltd.
[1920] 2 Ch. 97 applied.

APPEAL from Basingstoke county court.

By a lease dated July 17, 1937, the plaintiff, as landlord, demised to the defendants, as tenants, some five acres of land fronting Winchester Road, Basingstoke, together with a café and shop, and the living accommodation erected above it, four garages, a brick-built shed containing a Crossley one-hundred-and-ten volt generating plant, and a brick-built building containing a two horse-power Lester engine for pumping water, three Bowser petrol pumps, a tennis court, gardens, and an orchard. The habendum was to the tenants from September 29, 1937, for a term of seven years. The tenants covenanted "To keep the said Crossley one-hundred-and-ten
" volt generating plant Lester water pump and three Bowser
" petrol pumps and other apparatus for the time being in lease
" in good working order and condition (fair and reasonable
" wear and tear and damage caused by latent defects thereof
" and accident by fire or tempest excepted) and to replace by
" suitable articles of similar kind and equal value all such

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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“ parts thereof as shall become broken lost or worn out and to
“ take upon themselves and bear the entire responsibility of
“ the care control and management of the said equipment.”

On April 2, 1943, a requisitioning notice was served on the landlord and the tenants by the Hampshire war agricultural executive committee, stating: “ You are hereby notified that
“ in exercise of the powers conferred upon them by the
“ Cultivation of Lands Orders, 1939, the Hampshire war
“ agricultural executive committee, with the consent of the
“ Minister of Agriculture and Fisheries, will forthwith take
“ possession of the land described in the schedule hereto under
“ reg. 51 of the Defence Regulations, 1939, and the
“ committee hereby direct you to give up possession on
“ April 4, 1943.” The land specified in the schedule was
“ part of the premises known as the Bridge Garage,
“ Winchester Road, and comprising corrugated iron and
“ timber framed garage, brick and corrugated iron engine
“ shed, range of two lock-up garages, two petrol pumps, and
“ former tennis court, yard space and drive-in” The
tenants conceded that they were holding over as statutory
tenants, and the landlord conceded that the premises were
within the Rent Restriction Acts.

The landlord brought an action against the tenants for
possession on the ground that the condition of the premises
had “ deteriorated owing to acts of waste by the
“ tenant ” within the meaning of para. (b) of the First Schedule
to the Rent and Mortgage Interest Restrictions (Amendment)
Act, 1933, claiming arrears of rent, mesne profits and damages
for breach of covenant.

The electric light plant consisted of an engine and dynamo
bolted to a concrete bed, an instrument board, and the batteries
which were together on a table, the whole being housed in
a shed built of brick included in the requisitioning.

Section 1, sub-s. 1, of the Landlord and Tenant (Requisitioned
Land) Act, 1944, provides that “ where possession of
“ any land comprised in a lease is taken on behalf of His
“ Majesty, then while possession so taken is retained,
“ no remedy for breach of any repairing covenant contained in
“ the lease shall be enforced in respect of any damage
“ to the land occurring during that period”

On November 4, 1943, the tenants received a written
authorization from the war agricultural executive committee
to dismantle and store the electric light plant.

On this appeal the only question argued was whether the tenants were liable for the sum of 110*l.* claimed as damages for breach of covenant in respect of deterioration of the batteries of the electric light plant, the tenants' contention in the county court being that the batteries being a fixture and so part of the land requisitioned, they were consequently protected from liability by s. 1, sub-s. 1, of the Act of 1944.

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The county court judge held that the batteries were not fixtures, and that the tenants were liable for their deterioration notwithstanding the impossibility, due to the requisitioning, of keeping them in repair. He gave judgment for the landlord for 139*l.* 10*s.* damages, of which 110*l.* related to the batteries, and judgment for the tenants for 90*l.* 19*s.* on a counterclaim for rent overpaid. He made no order for possession, but set off the amount of the counterclaim against the damages, giving the landlord "liberty to apply" if the balance of damages should not be paid within three months after cessation of the requisitioning. The tenants appealed. There was no cross appeal by the landlord in relation to the counterclaim.

G. G. Baker and *H. B. Grant* for the tenants. The tenants were protected in respect of damage occurring to the land during the requisitioning. Damage to the fixtures would be included. There is no doubt that the engine of the generating plant, bolted to its concrete bed, was a fixture, and the tenants could not, in view of s. 1, sub-s. 1, of the Act of 1944, have been held liable for any damage to that attributable to the requisitioning. These batteries were fixtures none the less because merely set up on a table. They were an integral part not only of the generating plant, but of the engine itself, which was admittedly a fixture, and the plant could not function without them. [*Mather v. Fraser* (1), *Ex parte Astbury* (2) and *Sheffield & South Yorkshire Permanent Benefit Building Society v. Harrison* (3) referred to.]

L. A. Blundell for landlord. The only question on the appeal is whether the batteries were fixtures so that the tenants were wrongly held liable for the 110*l.* The batteries merely rested on a table. Apart from the connecting wires they were not attached to the land. There are four distinct parts of an electrical installation of this kind: (a) the various bulbs at

(1) (1856) 2 K. & J. 536.

(3) (1884) 15 Q. B. D. 358.

(2) (1869) L. R. 4 Ch. 630.

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the lighting points on the premises. They are not fixtures : *British Economical Lamp Co., Ltd., v. Empire, Mile End, Ltd.* (1) ; (b) the wiring system, which is clearly a fixture ; (c) the batteries, which store the current and could work the installation by themselves, like the batteries in a portable radio set ; (d) the engine, a fixture, the addition of which is a matter of convenience. It is used to keep the batteries replenished. An indication that the batteries are mere chattels is that, in theory, though it would be expensive, the installation could be worked by dry batteries bought as required.

There are two lines of authorities, those showing that a thing cannot be a fixture unless it is fixed, and those concerned with things which, while not fixed to the land, are integral parts of fixtures. The second line of authorities does not, it is submitted, apply to this case, whereas some of the authorities in the first line bear a striking analogy with this case. The requisite of a fixture is stated by Parke B. in *Hellawell v. Eastwood* (2). In *Wansbrough v. Maton* (3), a Dutch barn was held to be a chattel, an example of a movable object used in conjunction with a fixture, like the batteries here, being treated as a completely movable object. *Holland v. Hodgson* (4) shows that if the wires here are to be considered as annexing the batteries to the freehold, the burden will be on the landlord to show that they are not intended to be part of it. If, on the other hand, the wires do not constitute an annexation, the burden will be on the tenant to show that the batteries were nevertheless intended to be fixed to the land. *Longbottom v. Berry* (5) is a stronger case than this. The articles there held to be chattels (6) were much more difficult to move than these batteries. If the only thing which connects some apparatus, otherwise standing by its own weight, with the premises is some channel carrying power or water, there is no annexation of the apparatus to the freehold, for, the existence of the link being explicable by the function which it fulfils, the link cannot operate as an attachment of the apparatus to the freehold. *Northern Press & Engineering Co. v. Shepherd* (7) is again a stronger case than this of a thing being held to be a chattel, as also is *Hulme v. Brigham* (8).

(1) (1913) 29 T. L. R. 386.

(2) (1851) 6 Ex. 295, 312.

(3) (1836) 4 A. & E. 884.

(4) (1872) L. R. 7 C. P. 328,

(5) (1869) L. R. 5 Q. B. 123.

(6) Ibid. 139.

(7) (1908) 52 S. J. 715.

(8) [1943] K. B. 152.

The whole installation here is admittedly referred to as a generating plant. But the word "plant," it is submitted, throws no light on the question whether any part of it is a fixture or not. [*Mather v. Fraser* (1) and *Pole-Carew v. Western Counties & General Manure Co., Ltd.* (2), in particular the judgment of Warrington L.J., as explaining the principle (3), referred to.] The underlying factor about the authorities which speak of a movable thing as being an integral part of a fixed thing is that there is no complete article or apparatus without the movable as well as the fixed component. That is not the case with these batteries, for they are complete in themselves, and the engine could function without them. If the batteries are chattels, the fact that they are used in connexion with fixed things from the functional point of view does not make them fixtures unless they have no separate existence of their own, like, for instance, the starting handle of a fixed engine. A battery has a separate use of its own, and the mere fact that it is attached to a fixture does not change it from a chattel into a fixture. In any event, a mere wire conveying energy does not constitute attachment of batteries to the freehold.

Grant, in reply. The batteries being connected with the engine which is admittedly a fixture, the onus of proving that these batteries are nevertheless chattels is on the landlord: Birkett J. in *Hulme v. Brigham* (4), citing *Holland v. Hodgson* (5). The fact, which is a matter of common knowledge, that these batteries are capable of a separate use of their own is immaterial. The landlord must prove that they were in fact separate entities. If it is proved that the batteries work with the engine, then, since the engine cannot do its work without the batteries, they are a fixture.

MORTON L.J. The dispute really turns on the question whether there were included, under the words "brick and "corrugated iron engine shed" in the requisitioning notice, the batteries in respect of which 110*l.* damages were awarded for want of repair. If the batteries were included and possession was taken of them, the tenants would be protected from any claim for damages by reason of the Landlord and Tenant (Requisitioned Land) Act, 1944. The Act is headed :

(1) 2 K. & J. 536.

(2) [1920] 2 Ch. 97.

(3) Ibid. 120.

(4) [1943] K. B. 155.

(5) L. R. 7 C. P. 328.

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“ An Act to regulate the rights of the parties to leases of
“ requisitioned land with respect to the making good of damage
“ occurring during the requisition, and for purposes connected
“ therewith.” By s. 1, sub-s. 1, “ Where, in the exercise of
“ emergency powers, possession of any land comprised in
“ a lease is taken on behalf of His Majesty, then, during the
“ period while possession so taken is retained, no remedy for
“ breach of any repairing covenant contained in the lease shall
“ be enforced, whether by action or otherwise, in respect of
“ any damage to the land occurring during that period ; and
“ if the lease determines while possession of the land is so
“ retained, or if upon possession of the land being given up,
“ compensation in respect of the taking of possession thereof
“ becomes payable for any such damage to the person entitled
“ to the benefit of the covenant, no remedy for breach of the
“ covenant shall at any time be enforced as aforesaid in
“ respect of that damage.”

I think that it may be inferred, although it is not quite clear on the evidence, that the requisitioning authority did take possession of the land comprised in the notice on April 4, 1943, but that does not throw any light on the question whether these batteries were or were not included in the land of which possession was so taken.

Section 5 of the same Act defines “ damage ” as follows :
“ ‘ Damage ’ includes dilapidations, but does not include war
“ damage within the meaning of the War Damage Act, 1943.”
The definition of “ lease ” is not material. “ Repairing
“ covenant ” is defined as “ a covenant, whether express or
“ implied, and whether general or specific, to keep in repair
“ any premises comprised in a lease, or to leave or put any
“ such premises in repair, or to pay a sum of money in lieu
“ of leaving or putting the premises in repair, at the termination
“ of the lease, but does not include a covenant to lay out
“ in the reinstatement of any such premises money received
“ under a policy of insurance.” I think that it is plain that the
word “ land ” when used in s. 1 of this Act will include
buildings, and would also include any machinery which was so
affixed to the freehold as to become part of it.

[His lordship referred to the written authorization to the
tenant to dismantle the electric light plant, and continued :]
The county court judge, in discussing the claim for damages
relating to the engine and to the batteries, said : “ The electric
“ light plant was in one of the sheds requisitioned by the War

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“ Agricultural Committee. It was, as I find, a fixture, being
 “ attached to the concrete.” From what follows I think it
 plain that, when the judge says that the electric light plant was
 a fixture, he is referring to the engine, that being the part of
 the plant which was attached to the concrete. He continues:
 “ The landlord contends that damage to the electric plant was
 “ not damage to the land within the meaning of s. 1, sub-s. 1,
 “ but, in my view, at common law fixtures are part of the
 “ land, and by s. 5 ‘ damage ’ includes ‘ dilapidations,’ which
 “ seems to refer to buildings, and, in my opinion, would include
 “ fixtures attached to the buildings, and ‘ repairing covenant ’
 “ means a covenant to keep in repair ‘ any premises comprised
 “ ‘ in a lease.’ Here again the word ‘ premises ’ is used in the
 “ popular sense and would include buildings and fixtures which
 “ are part of the buildings. In my view, therefore, the landlord
 “ cannot, at present at any rate, claim damages for the
 “ deterioration of, and damage to, the fixed plant attached to
 “ the sheds which were and still are requisitioned. But the
 “ batteries were not in my view fixtures and were not part of
 “ the land of which possession was taken by the war agricultural
 “ committee.” Counsel for the landlord has invited us to
 treat that as two findings of fact which we cannot disturb :
 first a finding that the batteries were not fixtures, and, secondly,
 a finding that they were not part of the land of which possession
 was taken by the war agricultural executive committee.
 I cannot so read the passage. I think that the judge was
 expressing his view on the question whether, having regard to
 the evidence before him, and on the true construction of s. 1
 of the Act of 1944, the batteries were “ land ” of which
 possession was taken on behalf of His Majesty. I do, however,
 attach very great importance to that passage in the judgment,
 for the judge, after hearing all the evidence given in regard to
 this generating plant, has formed the view which I have already
 quoted. There was, in my view, evidence upon which he
 could fairly draw a distinction between these batteries and the
 engine which supplied power to them. [His lordship discussed
 the evidence, and continued:] The mere fact that some
 discussion might arise as to the meaning of that evidence
 illustrates how difficult it is to form a conclusion in any
 particular case whether batteries were or were not fixtures
 without having heard the whole of the evidence. I think that
 there was evidence on which the judge could form the con-
 clusion that they were not. In *Pole-Carew v. Western Counties*

C. A. & *General Manure Company, Ltd.* (1), Lord Sterndale M.R.
 1947 said: "Many cases were cited to us, and it is not from any
 "disrespect to the authorities, or to the arguments of counsel,
 "that I refrain from examining them in detail, but because
 "I agree with the statement in *Foà on Landlord and Tenant*,
 "5th ed., at p. 680: that 'inasmuch as the whole question
 "'is in each case one of fact depending on its own circum-
 "'stances, the decision in one case can seldom be a guide
 "'to a solution in another.'" I respectfully accept and
 adopt that statement for the purposes of the present case.

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Our attention was called to the following passage from the judgment of Blackburn J., delivering the judgment of the court in *Holland v. Hodgson* (2): "Perhaps the true rule is, "that articles not otherwise attached to the land than by "their own weight are not to be considered as part of the "land, unless the circumstances are such as to show that they "were intended to be part of the land, the onus of showing "that they were so intended lying on those who assert that "they have ceased to be chattels, and that, on the contrary, "an article which is affixed to the land even slightly is to be "considered as part of the land, unless the circumstances are "such as to show that it was intended all along to continue "a chattel, the onus lying on those who contend that it is "a chattel."

Counsel for the tenants submitted that in the present case there was evidence from which the court should infer that, at the time of the requisitioning, these batteries were connected in some way with the engine which supplied the power, and that, that being so, the onus was on the other side to show that the batteries were "intended all along to continue a chattel." That may well be a fair inference to draw from the evidence, and I am prepared to decide the case on the footing that the onus was on the landlord to establish that the batteries were chattels. Even so, it seems to me that the judge plainly thought that onus discharged, and after careful consideration of the whole matter I am not satisfied that he was wrong in his conclusion on the facts of this particular case. In so far as the county court judge awarded the landlord the sum of £110*l.* in respect of damage to these batteries, I think that his decision must stand.

BUCKNILL L.J. I agree. It seems to me that the crucial

(1) [1920] 2 Ch. 97, 116.

(2) L. R. 7 C. P. 328, 335.

question for this court to decide on this aspect of the case is whether the storage batteries were part of the "brick and corrugated iron shed" requisitioned by the Government on April 2, 1943. The batteries were part of the shed if they were fixtures. In the county court it was argued for the landlord, in effect, that the whole electrical plant in the shed was not a fixture. The tenants argued that the whole of the plant was a fixture. The question of the legal character of the batteries was of great importance, for the claim in respect of damage to the electric light batteries was 115*l.* out of 220*l.*, more than five times the amount of any other specific item of the claim.

The judge took the view, after hearing all the evidence, that he could divide the electric plant into two categories; that the engine, which was bolted down to a concrete bed, could properly be described as a fixture; and that the batteries were not fixtures. His judgment was reserved and written, and we are told by counsel that the judge himself, in the course of the trial, specifically directed his mind to the question of the legal character of the batteries—whether they were fixtures or not. Unfortunately there is very little evidence as to the precise location of the batteries in the shed. They certainly were not attached to the ground in any way, and it is not suggested that they were, directly; but it is argued that they were attached by wires to the engine which was itself attached to the ground and which the judge has held to be a fixture. That being so, I think that this court is entitled to take judicial notice of the function of these batteries. They are described as "storage batteries," and must have been attached by wires to the engine, and by other wires to the wiring system of the house.

The question which we have to decide is really whether these batteries were an essential part of the engine, which was a fixture, or a necessary and integral part of the engine, to quote the judgments in *Pole-Carew v. Western Counties & General Manure Company, Ltd.* (1). The judge has in effect said that they were not, and I do not see how this court can say, on the evidence, that he was wrong. It seems to me that this plant would have worked just as well if the batteries had been housed in another shed and attached by wires to the engine. True, they were part of the plant and, no doubt, necessary to make the electric light effective, but so also was the oil which

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drove the engine which worked the dynamo which created the current. They were not in any way necessary to make the engine work ; they were merely necessary as part of the whole scheme.

For these reasons I do not see how it is possible to say that the finding of the judge that the batteries were not fixtures (which seems to me to be largely a question of fact) is wrong, and I therefore agree that the appeal should be dismissed.

ASQUITH L.J. I also agree. Many authorities have been cited to us which purport to lay down criteria for determining what is and what is not a " fixture." Those criteria are not always easy to harmonize, but what practically all the cases emphasize is that each case ought to be decided with a close regard to its own facts. The facts here were far more fully available to the county court judge than they were to us, and this should make us slow to disturb his conclusion, unless he obviously applied a wrong principle of law. .

As regards the law, a criterion laid down in some recent cases, which seems to have been accepted by both parties to the argument, is that the test is whether the article in question is an integral or essential part of a machine which is itself admittedly a fixture. To me these batteries seem not so much an essential or integral part of the engine, or indeed a part of it at all, as a convenient accessory, a receptacle attached to the engine which supplies current, in which that current is stored (they are called " storage batteries "), and through which the current is transmitted to the wiring system of the house. If so, the case seems, on its facts, though not exactly on all fours with any that have been cited, more nearly analogous to *Northern Press & Engineering Company v. Shepherd* (1), *Hulme v. Brigham* (2) and *British Economical Lamp Company v. Empire (Mile End), Ltd.* (3) than to any of the cases cited for the tenants ; and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the tenant : *Simons, Haynes, Barlas & Cassels.*

Solicitors for the landlord : *Doyle, Devonshire & Co., for Dennis Berry & Co., Reading.*

(1) 52 S. J. 715.

(3) 29 T. L. R. 386.

(2) [1943] K. B. 152.

WATSON v. SAUNDERS-ROE, LIMITED.

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Landlord and tenant—Rent restriction—Breach of covenant by subletting—Landlord's waiver of breach—Premises "lawfully sublet"—Notice by tenant to terminate lease and sub-lease—Inability to give vacant possession—Landlord's claim for rent after expiry of notice—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 15, sub-s. 3.

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In breach of covenant, the tenants of a house within the Rent Restriction Acts sublet it without the consent of the landlord, who, however, accepted rent with knowledge of the breach. The tenants gave the sub-tenant due notice to quit, but he remained in possession as a statutory tenant. They then gave the landlord due notice of intention to quit. In an action brought by the landlord for rent for a period subsequent to the expiry of that notice on the ground that the tenancy remained in being since the tenants, through their own fault, had not given up the premises with vacant possession :—

Held, that the tenancy had been effectively terminated notwithstanding the facts that the notice terminating it had been given by the tenants and not by the landlord and that, through the sub-tenant's refusal to move, vacant possession had not been given ; that, in view of the landlord's waiver of the tenant's breach of covenant, the premises were "lawfully sublet," within the meaning of s. 15, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 ; and that as the sub-tenant was, in the above circumstances, deemed under that sub-section "to be the "tenant of the landlord . . . " the landlord's claim against the tenants for rent or use and occupation was invalid.

Reynolds v. Bannerman [1922] 1 K. B. 719 and *Norman v. Simpson* [1946] K. B. 158 applied.

APPEAL from Kingston county court.

At the beginning of the second World War, the defendants, Saunders-Roe, Ltd., opened a factory at Addlestone, and required accommodation there for their employees at that factory. By an agreement in writing dated September 30, 1940, made between the plaintiff, H. R. Watson, and the company, the landlord let to the company as tenants a house called "New House," King George's Drive, Addlestone, Surrey, for three years at a rent of 6*l.* 10*s.* 0*d.*, later increased to 6*l.* 13*s.* 9*d.*, a month payable in advance. By cl. 2 of the lease, "The tenants shall keep use and occupy the said "premises as a private dwelling-house only." Clause 3 provided: "The tenants shall not assign underlet or

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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"part with the possession of the said premises or any part thereof without the landlord's consent in writing it being nevertheless understood and agreed that the premises are to be used and occupied by one of the tenants' employees and his family." The use and occupation contemplated was accordingly use and occupation by an employee of the tenants, not as a sub-tenant but merely under licence from the tenants. Clause 9 gave the landlord a right of re-entry in the event of the rent being in arrear for twenty-one days "or on non-performance by the tenants or their representatives of any of the agreements on the tenants' part," contained in the tenancy agreement.

On October 15, 1940, in breach of cl. 3 of the tenancy agreement, the tenants sublet the property to one, Sutton, who was at that time in their employment, for one week, beginning on October 21, 1940, at an inclusive rent of 15s. a week. In fact the sub-tenant stayed on at that weekly rent as a statutory tenant. It was agreed in the present proceedings that the house was within the protection of the Rent Restriction Acts. On October 26, 1943, the landlord being at that time unaware of the subletting in breach of covenant, an agreement was executed between the landlord and the tenants whereby the tenancy created by the agreement of September 30, 1940, "shall continue after September 30, 1943, until determined by either party giving to the other one calendar month's notice in writing of his intention so to do subject otherwise to the same terms and conditions and to the payment of a rent of a like amount as are specified and reserved in the said agreement." Eventually the factory at Addlestone was absorbed into a combination of factories managed by the Fairey Aviation Company, Ltd. In February, 1944, the landlord refused an application by the tenants for a licence to assign the house to the Fairey Aviation Company, Ltd. On July 26, 1944, the landlord wrote giving the tenants one month's notice from July 31 to surrender the premises with vacant possession. On September 9, 1944, the tenants wrote to the landlord that they were unable to give vacant possession of the premises as they had sublet them. Notwithstanding that notification, the landlord continued to accept from the tenants the rent payable under the head tenancy, and took no further steps. On September 13, 1945, the tenants gave the sub-tenant notice to quit on September 22, but he, relying on the Rent Restriction

Acts, did not comply with the notice. On January 21, 1946, the tenants gave the landlord notice of intention to quit and deliver up possession of the house on February 28, 1946, and informed the sub-tenant that if he occupied the property after February 28 he should pay his rent direct to the landlord. On January 25 the landlord asked the tenants to confirm that, on expiry of their notice of intention to quit, vacant possession of the whole house would be given, to which the tenants replied that they were unable to remove the employee sub-tenant, so that the house would be handed over with that sub-tenant in possession. On February 28, 1946, the tenants paid the landlord a month's rent in advance for March.

The landlord brought the present action alleging that the tenants had held over on termination of their tenancy, and claiming rent for April, May and June, 1946, at the rate of 6*l.* 13*s.* 9*d.* a month. By an amendment allowed at the trial by the county court judge, the landlord claimed, in the alternative, the same sum for use and occupation. The tenants counterclaimed for the one month's rent which they contended that they had paid in error for March, 1946. The county court judge gave judgment for the landlord on his claim and on the tenant's counterclaim, and the tenants now appealed.

Bassett for the tenants. The county court judge has held that *Norman v. Simpson* (1) applies, so that the sub-tenancy is lawful within the meaning of s. 15, sub-s. 3, of the Act of 1920 (2). Under that sub-section, the sub-tenant is deemed to become the tenant of the landlord when the head tenancy has determined. Thus, if the court were to hold that the tenancy here had not been determined because no vacant possession was given, then the latter part of s. 15, sub-s. 3, would not apply. *Reynolds v. Bannerman* (3) is authority for saying that the tenancy here has been determined. Admittedly there has

(1) [1946] K. B. 158.

(2) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15, sub-s. 3: "Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason,

"any sub-tenant to whom the premises or any part thereof have been lawfully sublet shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

(3) [1922] 1 K. B. 719.

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always been an obligation at common law on a tenant on determination of the tenancy to deliver up the premises with vacant possession if the landlord requires it, but the landlord's remedy if the obligation is not fulfilled is in damages for being kept out of possession as a result of the tenant's breach of contract. That has been recognized not only in the authorities, but also by statute, for, by the Distress for Rent Act, 1737, if a tenant wilfully held over on the termination of his tenancy he had to pay double the rent ordinarily payable. In any event, however, the common law obligation on the tenant to yield up the premises with vacant possession has been abrogated by the Rent Restriction Acts.

The tenants here had given notice to quit to the sitting sub-tenant. There was nothing more that they could do to secure vacant possession to the landlord: see *Reynolds v. Bannerman* (1). The landlord might be entitled to damages, the measure of which would be the loss, if any, to him of another tenancy, and/or the cost of evicting the sitting sub-tenant. *Reynolds v. Bannerman* (1) may not be conclusive of this case, but there is strong reason for holding that it applies. Where, as here, there is a sub-tenancy which is lawful in accordance with *Norman v. Simpson* (2), with the consequences stated in s. 15, sub-s. 3, of the Act of 1920, then the first part of that sub-section must apply and the head tenancy must determine.

L. A. Blundell for landlord. This case has wider implications than appear at first sight. The tenants here are seeking, under the cloak of the Rent Restriction Acts, to slip out of the picture, leaving the landlord, it might in certain circumstances be, with a man of straw for tenant. The tenants here are obviously substantial. They contend that it is a secondary effect of the Act of 1920 that they should be able to shift their responsibilities for rent to a tenant as to whose substance the landlord has no guarantees. Looking at the matter at common law, the landlord here is entitled on the authorities to adopt, as he has done, the course of choosing to hold the tenants to their tenancy rather than to sue in ejectment or to claim damages. Taking the course which he has taken, he is entitled to be paid in respect of the sub-tenant's continued occupation, whether what he recovers is said to be rent or to be in respect of use and occupation. The questions then present themselves whether there is any difference between money received as rent and money received for use and occupation, and what is the interest of the tenant in the state of affairs which has come

(1) [1922] 1 K. B. 719.

(2) [1946] K. B. 158.

about—what interest is still subsisting in him after the date of expiry of his notice of intention to quit. It is a well-established principle that if a tenancy comes to an end by a notice to quit, and, after that, the tenant (a) remains in possession and (b) tenders rent which the landlord accepts, the law will infer a waiver of the notice to quit and an agreement to resume the tenancy on the old terms; but if it is the tenant who has served notice of intention to quit on the landlord, and, after its expiry, remains in possession, the landlord thereupon choosing to hold the tenant to his contract and demanding rent, then the position, surely, must be the same as above when it is the landlord who has given notice subsequently waived. The decision has passed irrevocably to the landlord, and the tenant is no longer in a position to say that he has no interest in the demised premises. Hence, the expression “use and occupation” to describe a relationship between landlord and tenant which has arisen through what the tenant has done and the landlord’s election made upon it either to sue for possession or to claim continued rent.

[MORTON L.J. That may be so if *du Parc* L.J.’s dissenting judgment in *Norman v. Simpson* (1) be right, and the existing sub-tenancy is not lawful; but, according to the majority decision there the sub-tenant is entitled to the protection of s. 15, sub-s. 3, of the Act of 1920, which means that the head tenancy must have determined.]

Norman v. Simpson (1) is, of course, conclusive with regard to s. 15, sub-s. 3, but that sub-section only applies where the interest of the tenant “has been determined.” That case is irrelevant to the present case, for it is only a decision on the lack of right of a landlord whose head-tenancy has determined because he has elected that it shall. The court had there merely to decide the contest between sub-tenant and landlord—whether the sub-tenant was entitled to hold over as against the landlord. This case is distinguishable from *Norman v. Simpson* (1), because there it was the landlord who gave the tenant notice to quit, whereas here the notice was by the tenants, who failed to implement their notice by giving up possession. Whichever party has served the notice, it is material to see whether anything occurred after its expiry from which the inference of a continuing tenancy must be drawn.

Assuming that the decision of the majority in *Norman v. Simpson* (1) is correct, the basis of the argument for the tenant

(1) [1946] K. B. 158.

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in this case is that the head tenancy has not been determined. *Reynolds v. Bannerman* (1) then has to be surmounted. So long as the intermediate tenants are there, the landlord cannot touch the sub-tenant. No contest can arise between landlord and sub-tenant here, so *Norman v. Simpson* (2) cannot, surely, be applicable. If the landlord receives payment—whether as rent or for use and occupation—from the tenants, no one will seek to disturb the sub-tenant.

[BUCKNILL L.J. Do you say that such an action as this might have lain against the head tenant in *Norman v. Simpson* (2) ?]

There the notice was given by the landlord. If, as here, the tenant had given notice of intention to quit and had then gone, leaving the sub-tenant in possession, that would have raised a very different question. Once the landlord has acted as he did in *Norman v. Simpson* (2), he is not in a position to advance the argument which is advanced for the landlord here. The decision in *Norman v. Simpson* (2) flowed from the landlord's election to treat the tenancy as at an end.

[MORTON L.J. Does *Norman v. Simpson* (2) not involve that the sub-tenant here is in the same position as the sub-tenant there, and, also, that the head tenancy is determined ?] The answer would seem to be, again, that here it is the tenant who, by himself giving the notice, has given the landlord a right of election, which he has exercised in such a way as to make *Norman v. Simpson* (2) inapplicable.

[ASQUITH L.J. Your argument is that the facts in this case do not bring the first part of s. 15, sub-s. 3, into operation, so that the rest of the sub-section does not apply ?] Yes, and, further, that *Norman v. Simpson* (2) does not apply either. The purpose of the Rent Restriction Acts being to protect the position of occupying tenants or sub-tenants, they can hardly be interpreted so as to disturb contractual arrangements where no one is seeking to disturb the occupation of, or rent payable by, the occupying sub-tenant.

[ASQUITH L.J. Does your argument not involve our overruling *Reynolds v. Bannerman* ? (1).] Not directly, at all events, for that case is distinguishable in that the subletting there was not in breach of covenant. If that factor was in the minds of the judges of the Divisional Court, as, it is submitted, it was, then the case is distinguishable.

Bassett was not called upon to reply.

(1) [1922] 1 K. B. 719.

(2) [1946] K. B. 158.

MORTON L.J. [after stating the facts:] The sequence of events was thus an original breach of contract by the tenants in subletting; an acceptance of rent by the landlord with full knowledge of that breach of contract; an attempt by the tenants to deprive the sub-tenant of possession; and a notice by the tenants to the landlord of intention to determine their tenancy.

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It seems to me that this case is concluded against the landlord by the decision of this court in *Norman v. Simpson* (1), combined with the decision, with which I agree, of the Divisional Court in *Reynolds v. Bannerman* (2). In *Norman v. Simpson* (1) the facts were as follows: There had been a grant of a tenancy from a freeholder to a tenant. By 1940 the tenancy had become one from year to year. The tenancy agreement contained a covenant by the tenant not to sublet the house without the written consent of the landlord. In 1940 the tenant sublet the house furnished to the defendant, and in September, 1940, he sublet it to that sub-tenant unfurnished at the rent of 156*l.* a year. In neither case was the consent of the landlord obtained. The landlord, with full knowledge of the subletting in breach of covenant, continued to accept rent from the head tenant. On June 12, 1944, the landlord gave the tenant notice to quit the house on March 25, 1945, and in December, 1944, she conveyed the freehold to the plaintiff. It was not contended before this court that the head tenancy had not determined, and nobody doubted that the case came within the opening words of s. 15, sub-s. 3: "Where the interest of a "tenant of a dwelling-house to which this Act applies is "determined." The majority of this court came to the conclusion that the premises had been "lawfully sublet" to the sub-tenant within the meaning of the section, because the relevant question was "What was the status of the sub-"tenant immediately before the tenancy of the head tenant "was determined?" In our view, he was at that time a sub-tenant lawfully in possession, by reason of the fact that the landlord had accepted rent from the head tenant with full knowledge of the subletting.

It seems to me that that case is precisely on all fours with the present case except for two matters. The first is that there the notice to quit was given to the head tenant by the landlord, while here the notice of intention to quit was given by the head tenant to the landlord. The second is that there the landlord

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(2) [1922] 1 K. B. 719.

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was suing the sub-tenant and was not taking any proceedings against the tenant who had originally committed the breach of covenant. Having regard to the decision in *Norman v. Simpson* (1), and disregarding for the moment the two matters which I have just mentioned, what is the position of the sub-tenant in the present case? The inevitable conclusion is that since February 28, 1946, he has been deemed to be the tenant of the landlord on the same terms as he, the sub-tenant, would have held from the tenants if their tenancy had continued. If that is so, it seems to me to cut out entirely any claim by the landlord for rent or for use and occupation against the tenants. He cannot claim the rent, because the person deemed to be the tenant is the sub-tenant and not the tenants; and he cannot claim for use and occupation because the sub-tenant, and not the tenants, is in occupation and he is not there as an agent of the tenants.

I think that *Reynolds v. Bannerman* (2) assists us in considering the question whether it makes any difference, first that in the present case the notice to quit was served by the tenant instead of by the landlord as in *Norman v. Simpson* (1), and, secondly, that the person against whom the action is brought here is the head tenant and not the sub-tenant. The facts in *Reynolds v. Bannerman* (2) are thus correctly stated in the headnote in the Law Reports: "A tenant gave his landlord "due notice to quit, and also gave due notice to his sub-tenant of part of the premises to quit at the termination of "the tenant's tenancy."—there was no breach of contract in the subletting there—"The sub-tenant, being entitled "under the provisions of the Increase of Rent, etc. (Restrictions) Acts to continue in occupation, refused to quit. The "tenant duly gave up possession to the landlord of his part of "the premises, but was, for the above reasons, unable to give "vacant possession of the whole:—Held, that as the tenant "had done all he could do to give vacant possession, he was not "liable to the landlord for use and occupation for the period "during which the latter was kept out of possession." Swift J. said (3): "It is obvious on reading it"—that is, s. 15, sub-s. 3—"that the legislature contemplated the position "that a tenant's interest in the premises might cease while a "sub-tenant remained in occupation. The whole object of the "sub-section is to regulate the position of such a sub-tenant,

(1) [1946] K. B. 158.

(2) [1922] 1 K. B. 719.

(3) Ibid. 724.

" and if the tenant's interest cannot cease while the sub-tenant " is in possession, then it seems to me that the sub-section is " useless. The mere fact that a person is in possession who " has originally got possession as a sub-tenant, does not prevent " the interest of the tenant ceasing at the expiration of his " notice to quit." Thus, the Divisional Court took the view, and, as I think, rightly, that the fact that a sub-tenant was in possession who was protected by the Acts, and who did not go out on the termination of the head tenant's tenancy, did not prevent the interest of the head tenant from ceasing at the expiration of his notice to quit. Secondly, that case shows, I think, that it makes no difference for the present purpose whether the notice to quit is given by the landlord or by the head tenant. If the notice is given in accordance with the contract between the landlord and the head tenant, the tenant's interest comes to an end. Thirdly, in *Reynolds v. Bannerman* (1), as in the present case, the action was brought against the head tenant. Lastly, if it be said, as it was truly said in argument, that there was nothing unlawful in the subletting in *Reynolds v. Bannerman* (1), the reply is that, having regard to the decision in *Norman v. Simpson* (2), the premises were, at the material time, that is to say, just before the expiration of the notice to quit, " lawfully sublet " to the sub-tenant in both *Reynolds v. Bannerman* (1) and the present case. *Norman v. Simpson* (2) shows that the only possible distinction between the present case and *Reynolds v. Bannerman* (1) is a distinction without a difference in the eyes of the law for the present purpose, the present purpose being an action by the landlord against the head tenant for rent or, alternatively, for use and occupation. I do not propose to consider what might have been the result of this case had *Norman v. Simpson* (2) been differently decided. In my view, having regard to the two cases last cited, the action ought to have been dismissed, and on that footing I apprehend that there is no question but that the counter-claim for rent over-paid must succeed.

The county court judge appears to have thought that the case of *Norman v. Simpson* (2) applied to protect the position of the sub-tenant, but that in some way, if the tenants succeeded in this case, they would be taking advantage of their own wrong. I do not think that that view can be supported. As a result of the landlord's electing to accept rent after he knew of the subletting, the position of the sub-tenant

(1) [1922] 1 K. B. 719.

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immediately before the notice to quit expired was that he was a person to whom the premises had been lawfully sublet. As a result of the statute, the sub-tenant is entitled to remain in possession, and is deemed to be the tenant of the landlord as from February 28, 1946. It is for this reason that no payment for rent or use and occupation can be recovered from the tenants. In my view, this appeal must be allowed.

BUCKNILL L.J. I agree.

ASQUITH L.J. I agree. In spite of the accomplished argument of Mr. Blundell, *Norman v. Simpson* (1)—a decision at present binding upon this court—seems to me conclusive in favour of the tenants. The county court judge, in seeking to distinguish it, says: "Although the landlord by waiving his "right of forfeiture might have put himself in the position "that he could not turn out the sub-tenant, the only reason that "the tenant fails to give vacant possession is that he has "unlawfully in breach of covenant created a situation he cannot "remedy. Analysed from that point of view *Norman v. Simpson* (1) is irrelevant." With great respect, I do not quite follow the reasoning of that. The unlawful character of the subletting seems to me clearly not the only reason, or indeed any reason, why the tenant could not give vacant possession. He would be equally unable to give vacant possession and a situation beyond his remedy would equally have arisen if the subletting had been lawful, as in *Reynolds v. Bannerman* (2); and the effect of *Norman v. Simpson* (1) seems to me to be that, for a purpose such as the present, a subletting which is unlawful must, after the breach of covenant has been waived, be taken to be lawful, and the sub-lessee must be taken to be a person to whom the premises were lawfully sublet, and the head lessee a person who has lawfully sublet to him. Apart from the distinction between a sub-lease which was lawful ab initio and one validated by waiver, Mr. Blundell, for the landlord, relied on another distinction: that between the case where a notice to quit is given by the landlord and the case where it is given by the tenant and followed by a failure to give possession. Counsel suggested that, in the first class of case, the tenant's interest was determined under s. 15, sub-s. 3, of the Act of 1920, but that, in the second class of case, it was not. It does not seem to me possible to maintain this distinction without overruling *Reynolds v. Bannerman* (2), a decision which

(1) [1946] K. B. 158.

(2) [1922] 1 K. B. 719.

has stood for nearly a quarter of a century and which is, in my respectful opinion, sound. I agree that the appeal should be allowed.

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Appeal allowed.

Solicitors for appellant tenants : *Tilbrook & Hunt, Woking.*

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Solicitors for respondent landlord : *Sherwood Cobbing & Co., Kingston-on-Thames.*

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Landlord and tenant—Sale of demised premises—Part-payment of purchase price—Delivery of conveyance as escrow—Purchaser's notice to quit to tenant—Whether valid or validated on payment of balance of purchase price—Month's notice to weekly tenant—Subsequent week's notice while earlier notice current—Validity.

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Bucknill and
Asquith L.JJ.

The defendant, as tenant of a house within the Rent Restriction Acts, sub-let it furnished on a weekly tenancy to the plaintiff. Requiring the house for his own occupation, the defendant on April 5, 1946, gave the plaintiff notice to quit on May 4. On April 1, the plaintiff entered into an oral agreement with the freeholder to buy the house, and paid a deposit. Having heard of that agreement, the defendant on April 10, gave the plaintiff, as sub-tenant, a second notice to quit on April 20. On that date the plaintiff paid the freeholder a further sum on account, and on April 12 he, purporting to act as landlord, gave the defendant notice to determine his tenancy on April 20. The conveyance was dated April 10, but the balance of the purchase price, with a sum by way of interest approximately equivalent to the rent, was paid only on June 21. In an action by the plaintiff against the defendant for possession based on the contention that he was not an occupying tenant, the defendant counter-claiming for possession against the plaintiff as sub-tenant,

Held, that, in the absence of direct evidence as to the delivery of the deed of conveyance, the fact that on April 10 only part of the purchase price had been paid justified the inference that the deed, if delivered on that date, was delivered as an escrow pending payment of the balance; that the deed, on being made effective on June 21 by payment of the balance, could not operate retrospectively to validate the plaintiff's notice to quit to the defendant dated April 12; that the plaintiff had no power to give that notice on that date since he was not yet the freeholder and might never have become so; that the defendant was entitled, during the currency of his first notice to the plaintiff to quit, to give him a second notice appropriate to determination of a weekly tenancy and expiring before the first, so that the notice to the plaintiff to quit on April 20 was valid; and that the defendant, as tenant, was accordingly entitled to possession of the house.

Foundling Hospital v. Crane [1911] 2 K. B. 367 discussed.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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APPEAL from Whitehaven and Millom county court.

The defendant, John McCullough, was the tenant at 7s. a week of a house, within the Rent Restriction Acts, in Springfield Road, Biggrigg, of which one Kirkbride was the freeholder. In February, 1945, on the determination of an earlier furnished sub-tenancy, the tenant let the house furnished to the plaintiff, Edward Albert Thompson, at 14s. a week. Having left the Army in 1945 and been demobilized in March, 1946, the tenant, who wished to marry, gave the sub-tenant notice, dated April 5, 1946, to quit the house on May 4, 1946. Hearing that the sub-tenant was trying to buy the house, the tenant gave him a new notice, dated April 10, to quit on April 20.

On April 1, 1946, the sub-tenant verbally agreed with Kirkbride to buy the house, and paid a deposit; on April 10, he made a further payment of 29*l.*; on April 12 he gave the tenant notice to quit the house on April 20; and on June 21, he paid the balance of the purchase price, 79*l.* 10s. The sub-tenant, as landlord, brought an action for possession against the tenant who himself counterclaimed possession against the landlord as sub-tenant. The county court judge found that the deed conveying the freehold of the house from Kirkbride was delivered as an escrow, and that it could not, on completion of payment of the purchase price on June 21, validate the notice to quit of April 12 given to the tenant, which was then invalid because the legal estate in the house had not then yet passed; that the notice from the tenant to the landlord as sub-tenant to quit on April 20 was valid. He therefore dismissed the action, but gave the tenant possession against the landlord as sub-tenant on the counterclaim. The landlord appealed.

Heilpern for landlord. It is submitted first that there was no evidence entitling the county court judge to find that the deed of conveyance of the house was delivered only as an escrow. If there was evidence for such a finding, then the escrow, on its becoming effective by payment of the balance of the purchase price on June 21, would relate back to the date of its delivery to the purchaser as an escrow, and so have the effect of validating the notice to quit given to the tenant on April 12: see per Farwell L.J. in *Foundling Hospital v. Crane* (1). The tenant cannot claim exception, on the ground of his war service, from the principle that a tenant must be in occupation of the

(1) [1911] 2 K. B. 367, 377.

premises in order to keep the protection of the Rent Restriction Acts, for he had sublet the house. When the notice to quit, given to the tenant on April 12, expired on April 20, the tenant was not in possession. The tenant was out of occupation at all material times when resisting the landlord's claim to possession, but the crucial time is the expiry of the contractual tenancy : see *Haskins v. Lewis*, per Romer L.J. (1). The principle there enunciated is adopted and emphasized in *Skinner v. Geary* (2). The premises were, in any event, taken out of the protection of the Rent Restriction Acts by reason of the furnished letting : see *Prout v. Hunter* (3). The material date for this purpose is May 29, 1946, when the landlord took his proceedings : *Leslie & Co., Ltd. v. Cumming* (4). Admittedly at that date the furnished sub-tenancy had come to an end as a legal entity, but the furnished occupation of the sub-tenant remained.

[MORTON L.J. Does that help the sub-tenant if he has become a trespasser ?] The tenant might well have no intention of turning the sub-tenant out, in which case he would not be a trespasser ; and his furnished occupation would then, it is submitted, keep the premises outside the Act. The principle of *Prout v. Hunter* (3) was extended in *Leslie & Co., Ltd. v. Cumming* (4), and is that the protection of the Acts returns to premises not merely as soon as the sub-tenancy expires, but when that happens *and* the sub-tenant in fact goes out.

The notice to quit of April 10 given by the tenant to the landlord as sub-tenant is invalid because given during the currency of the notice given by the tenant on April 5 to expire on May 4. There is little authority on the point, but a person who has given his tenant notice to quit cannot, during its currency, give a second notice to quit, for the first notice is irrevocable. It is out of his hands, having given his tenant notice to quit, to give a second notice to expire during the currency of the first.

J. V. Nesbitt for the tenant. The county court judge has found that the conveyance was executed as an escrow on April 10, 1946, and that it was still an escrow on the 12th, when the landlord served his notice to quit. In coming to that conclusion the judge was entitled to take all the circumstances into account, and also the practice of conveyancers. There was, accordingly, a strong presumption here that the conveyance was executed as an escrow, and the burden was on the landlord to rebut that presumption, the question whether or not a deed

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(1) [1931] 2 K. B. 1, 18.

(2) [1931] 2 K. B. 546, 560.

(3) [1924] 2 K. B. 736.

(4) [1926] 2 K. B. 417.

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was delivered as an escrow being one of fact: Norton on Deeds (2nd ed.), p. 20; and there was ample evidence on which the county court judge could hold that the conveyance had been executed as an escrow. If the deed was an escrow, it could not on its subsequent delivery as a deed date back to validate a notice to quit which there was otherwise no power to give. The rule cited by Farwell L.J., in *Foundling Hospital v. Crane* (1) is that "On the second delivery of the writing it will "have relation, for the purposes of title, and not for the purpose "of giving a right to intermediate rents, etc., from the "delivery." If the relation back does not apply to intermediate rents, a fortiori it cannot apply to such a thing as a notice to quit. It would be a great hardship on a tenant if he could be turned out on the strength of an escrow, when the condition of its becoming an executed deed might never be carried out. The tenant might in such a case be turned out only to find himself liable to the original landlord, the vendor, for rent. Here, moreover, not only was the deed an escrow when the notice of April 12 was given, but it was still an escrow when the proceedings were begun. An escrow cannot be said to relate back to validate a notice to quit as to which the tenant could not be sure, when it was served, whether it was valid or not.

Assuming that the deed when delivered was an escrow, but that it did relate back to validate the notice to quit to the tenant, dated April 12, then on April 21 the tenant became a statutory tenant, and the furnished sub-tenancy had expired either on April 20 if the second notice to quit was valid, or, if not, then on May 4, when the first notice to quit expired. In considering the status of a tenant of a Rent Act house, the material time is the beginning of proceedings, in this case May 29, 1946, when the landlord brought his action for possession: *Leslie & Co., Ltd. v. Cumming* (2). The mere fact that the sub-tenant wrongfully continued his furnished occupation of the house after the furnished sub-tenancy had been determined is no ground for holding the Rent Restriction Acts inapplicable to the house. The landlord cannot rely on his own wrongful act in holding over as sub-tenant. Neither can it be said that the tenant lost the protection of the Acts through not being in occupation, since that was due solely to his war service and the county court judge has found that he wanted to return to the house at the end of his war service. He was out of occupation through no fault of his own, and

(1) [1911] 2 K. B. 367, 377, 378.

(2) [1926] 2 K. B. 417.

accordingly that cannot count against him. [MORTON L.J. I doubt whether the tenant could rely on the fact of his being a soldier while the house was sublet.] Had the notice to quit been complied with by the sub-tenant on April 20 or on May 4, the tenant could have been in possession on May 29, the material date when the proceedings were begun. Moreover, the landlord, by the very fact of bringing his action for possession, is treating the tenant as a person in possession.

As to the validity of the second notice to quit given by the tenant on April 10, the authorities only say that a notice to quit is irrevocable in the sense that the landlord cannot, after giving it, force the tenant to agree to continue the tenancy. There is no authority debarring the landlord from giving a subsequent shorter notice so long as it is in accordance with the terms of the lease. Where a landlord has given a notice to quit determining a weekly tenancy a month later without receiving consideration for that benefit afforded to the tenant, and if the tenant has not changed his position on the strength of that notice, there is nothing to debar the landlord from giving a week's notice in accordance with the tenancy to take effect before expiry of the earlier month's notice.

Heilpern in reply. The onus of proving that a deed is an escrow is on the person alleging it to be so. There is no presumption of law that if a deposit is paid on the purchase of a house, and the balance is paid later, the deed of conveyance is delivered as an escrow.

MORTON L.J. [after stating the facts :] Counsel for the landlord put forward the following four contentions : First, that there was no evidence on which the judge could find that the conveyance was delivered only as an escrow on April 10, 1946. In the second place, he contended that, even if he were wrong on that point, when the balance of the purchase price was paid on June 21, the delivery of the conveyance dated back to April 10, so that the notice to quit given on April 12 was validated. Thirdly, he submitted that, although the premises admittedly come within the Rent Restriction Acts, the landlord was entitled to possession, because the tenant would not be protected by those Acts as he was not in possession of the house at the time when the notice to quit given by the landlord terminated, the landlord himself being in occupation of the house at the same date as sub-tenant. In those circumstances, Mr. Heilpern contended, the Acts gave the tenant no protection. Fourthly

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and lastly, he contended that, in any event, the tenant's notice to quit given on April 10 could not be valid because he had already given on April 5 a notice to quit expiring on May 4. On the pleadings the only notice relied on by the tenant is the second notice of April 10, which was due to expire on April 20.

As to the first contention, it is, I think, clear that the burden was originally on the present landlord to prove that the conveyance was effectively delivered on April 10. His attention had been brought pointedly to that question by an attempt on the part of the tenant to deliver interrogatories, of which those material were " (2.) Has the plaintiff yet paid " the vendor the whole of the purchase price of the property ? " (3.) If so, on what day was the balance of such money paid ? " (4.) When was the said conveyance or assignment delivered " by the vendor so as to pass to the plaintiff the legal estate in " the said property ? " Those interrogatories were disallowed by the registrar, and, on appeal, also by the county court judge, though in the judgment now before us he expresses the view that he had been wrong in disallowing them. However, it must have been well in the mind of the present landlord and his advisers that some point was going to be taken with regard to the delivery of this deed.

The question whether a document is delivered as an escrow or as a deed is in general one of fact, and I think that the following passage from Norton on Deeds (2nd ed.), at p. 20 accurately states the law : " Whether the document was delivered as an " escrow or as a deed is a question of what the parties intended, " and that intention may appear either from their statements or " the circumstances." The learned author then quotes the following observation of Parke B. in *Bowker v. Burdekin* (1) : " You are to look at all the facts attending the execution, to all " that took place at the time, and to the result of the trans- " action ; and therefore, though it is in form an absolute " delivery, if it can reasonably be inferred that it was delivered " not to take effect as a deed till a certain condition was " performed, it will nevertheless operate as an escrow." The author goes on : " Thus the delivery of a transfer of mortgage " was held to be an escrow until the mortgage money had been " paid . . . and of a conveyance until the purchase money " had been paid . . . The circumstances relied upon to show " delivery as an escrow must be prior to or contemporaneous

(1) (1843) 11 M. & W. 128, 147.

"with, not subsequent to, the delivery Evidence is, "of course, admissible as to what were the circumstances "attending the delivery and the question is in general "one of fact for the jury."

What was the evidence before the county court judge on the question whether or not the deed was delivered as an escrow? The landlord produced the conveyance, which contains the statements that it was "signed sealed and delivered by the said "Joseph Thompson Kirkbride"; that "this conveyance is "made on the tenth day of April, 1946"; and that "in witness "whereof the said parties to these presents have hereunto set "their hands and seals the day and year first before written." The production of the conveyance was supplemented by the oral evidence of the landlord, which, according to the judge's note, was that on April 10, 1946, he purchased from Kirkbride. Cross-examined, he said that he first agreed to purchase from Kirkbride on April 1, 1946; that it was a verbal agreement; that he paid a deposit and obtained a receipt from a clerk in the office of the solicitor then acting for both parties. Another solicitor then acting for Kirkbride, and acting for the present landlord in these proceedings, stated that a deposit of 5*l.* was paid on April 1, with a further payment on April 10, of 29*l.*, and on June 21 the balance of 79*l.* 10*s.*, which included interest, approximately equivalent to the rental. Thus, on the one hand, there is the conveyance and the evidence of the present landlord; on the other, there is uncontradicted evidence that the same solicitor acted for both parties and that, at the date which the conveyance bears, only 34*l.* had been paid out of the purchase price of 110*l.* From the latter evidence, it seems to me, the natural inference would be that if the deed was delivered at all on April 10 it was delivered as an escrow. It would have been a most remarkable thing if Kirkbride had effectively delivered to the purchaser a conveyance at a time when only 34*l.* out of the purchase price of 110*l.* had been paid. The purchaser could then have sold or mortgaged the property or dealt with it in any way he wished. The normal thing would have been for the solicitor acting for both parties to retain the deed until the balance of the purchase price was paid, and for the deed to have been effectively delivered so as to pass the property to the purchaser when that happened. As to the other evidence, the purchaser, the present landlord, having been previously forewarned of this point about delivery, said nothing more than

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that on April 10, 1946, he purchased from Kirkbride, which may mean nothing more than that Kirkbride executed a conveyance on that date. The sequence is as follows: the original burden being on the present landlord, he produces the conveyance and gives the evidence to which I have referred. Evidence is then led, again by the landlord, showing that the whole of the purchase price had not been paid. That seems to me to lead to the inference that the document was not effectively delivered on April 10. That being the position on the evidence, I think that it was quite open to the county court judge to find, as he did, that the conveyance was delivered only as an escrow on April 10, and that the condition, the fulfilment of which would make the delivery effective, was payment by the present landlord of the balance of the purchase money. The result is that as regards the first point I see no reason for disturbing the finding of the county court judge that this document was an escrow and nothing but an escrow until June 21, 1946.

The second contention for the landlord is that, even if that is so, the delivery of the conveyance relates back so as to make his notice to quit of April 12 effective. Apart from authority, that would seem to me a very startling proposition. It involves that a man can effectively as landlord give a notice to a tenant at a time when it is quite uncertain whether he, the giver of the notice, will ever be the landlord in fact. On April 12 it was quite uncertain whether the present landlord would ever pay the balance of the purchase money. In fact, he did not pay it until long after the notice to quit had expired. For relation back to have such an effect as that would render the position of a tenant quite intolerable. On April 20, if counsel's argument is right, the tenant would not know whether or not the notice which he had received was a valid notice to quit. Apart from authority, I should have thought that the ultimate payment of the purchase money could not have the effect of validating a notice given at a time when the fee simple was not effectively vested in the giver of the notice. The only authority to which counsel referred on this point was *Foundling Hospital v. Crane* (1). The facts of that case do not matter for the present purpose, but counsel for the landlord relied on the following passage in the judgment of Farwell L.J. (2): "The rules relating to escrows are thus stated by Preston in his book on "Abstracts (2nd ed., vol. 3, p. 65) . . . on the second

(1) [1911] 2 K. B. 367.

(2) Ibid. 377.

"delivery of the writing"—that is the effective delivery—"it will have relation, for the purposes of title, and not for the purpose of giving a right to intermediate rents, etc., from the delivery; (4.) so as the conditions be performed, and the deed delivered a second time, the deed will be good, notwithstanding the death of both or either of the parties before the second delivery." The lord justice goes on to say that Sheppard's Touchstone (8th ed., pp. 58-60), is to the same effect. It seems to me that that passage does not establish Mr. Heilpern's proposition. Apparently the relation back does not have the effect of giving "a right to intermediate rents, etc.," from the time of the original delivery, and, if that be so, I can see no good reason why it should have the effect here of validating a notice to quit given at a time when the fee simple was not vested in the person giving it. The result is that my view of the true position is not shaken by any authority which has been cited to us. I would add, in case it be material, that, when these proceedings began, the document was still an escrow and that the present landlord was not the owner of the property. The result is that, in my view, the notice to quit given by the present landlord to the tenant was not effective, and that the contractual tenancy of the tenant at 7s. a week is still subsisting. Thus the question under the Rent Restriction Acts raised by counsel's third contention does not arise.

It is still necessary, however, to determine his fourth contention, raising the question whether the tenant has given an effective notice to determine the furnished sub-tenancy of the landlord. This is a point which seems to be entirely devoid of authority one way or the other; but in my opinion the answer must be "Yes." When the tenant gave his first notice on April 5 to expire on May 4, the position was that, if nothing further had been done, the sub-tenancy would have expired on May 4. Without the consent of the landlord it would not have been open to the tenant to extend that sub-tenancy for a longer period. In the meantime, however, up to May 4, the sub-tenancy was still in existence as a weekly tenancy. That being so, in the absence of authority to the contrary, I think that it was still open to the tenant to give his sub-tenant a notice appropriate to the determination of a weekly tenancy, and that he did so by giving a notice on April 12 to expire on April 20. The result is that, in my opinion, the furnished sub-tenancy of the landlord was validly determined, and that the tenant is entitled to possession

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of the premises as a contractual tenant at 7s. a week. The order made by the county court judge was right, and the appeal must be dismissed.

BUCKNILL L.J. I agree that the appeal should be dismissed. The crucial question is whether the landlord on April 12 had a legal right to give the tenant notice to quit expiring on the 20th. The judge in his judgment said that the tenant's advocate had argued that the deed of conveyance giving the legal estate to the landlord was not delivered until June 21, and that, the tenant had a right to know when he received notice to quit that the person giving it had a right or title to give it, so that this was an exception to the rule that the title related back. The judge thought those submissions right, and he found that, on the date on which that notice to quit was given, the present landlord was not in a position to give it, so that the notice was invalid. That seems to be a finding of fact. The evidence about the transfer of title from Kirkbride to the present landlord appears most unsatisfactory. [His Lordship considered the evidence, and continued:] The tenant very properly applied to get evidence about these very material facts, which were within the landlord's, but not his, knowledge—namely, the important questions when the money was paid and when the conveyance was delivered—and the landlord refused to answer those questions. Unfortunately that refusal was upheld by the judge, who concurred in the decision of the registrar. The judge says, I think rightly, that he came to a wrong conclusion on that point. In that very unsatisfactory state of the evidence he had to rely very largely on the probabilities in the case. It seems to me that the overwhelming probabilities in a case of this kind are that the vendor did not pass the property in the premises to the purchaser until he had received the purchase price; and the bulk of the purchase price was not paid until June 21. I think that the judge came to a right conclusion on this point. On the rest of the case I agree with what my Lord has said.

ASQUITH L.J. I agree.

Appeal dismissed.

Solicitors for the appellant landlord: *William Charles Crocker, for W. C. Sumner, Whitehaven.*

Solicitors for the respondent tenant: *Broughton & Co., for Milburn & Co., Workington.*

GOODWIN AND ANOTHER v. STORRAR.

1946

Dec. 19.

Denning J.

Costs—Taxation—Action under Fatal Accidents Act—Order for payment of costs by defendant “as between solicitor and client”—Meaning—R. S. C., Or. 22, r. 14, sub-r. 11.

The words “costs as between solicitor and client” in R. S. C., Or. 22, r. 14, sub-r. 11, which provides for the taxation of the costs of the plaintiff in any cause or matter, mean the costs which a client ought properly to pay to his own solicitor.

Where therefore a consent order was made in favour of the plaintiffs in an action brought by personal representatives under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, and a provision was included that the defendant should pay to the plaintiffs’ solicitors the costs of the action as between solicitor and client to be taxed:—

Held, that the plaintiffs’ solicitors were entitled to be paid such costs as were found by the taxing master to be properly payable to them by their own clients.

Giles v. Randall [1915] 1 K. B. 290, considered and distinguished.

Considered. REED
v. GRAY
[1952] 1 Ch. 337

APPLICATION FOR REVIEW OF TAXATION OF COSTS.

The plaintiffs were personal representatives of a man and his wife who were killed as a result of an explosion at a munition works, and they brought an action against the defendant claiming damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and a sum under the Fatal Accidents Act for the benefit of the two children of the deceased. The action was settled on the terms that 250*l.* was to be paid in respect of each of the deceased under the Law Reform (Miscellaneous Provisions) Act, 1934 and 1,750*l.* under the Fatal Accidents Act. The settlement was embodied in a consent order approved by the court, which contained the following provision as to costs: “The defendant pays to the “plaintiffs’ solicitors the costs of this action as between solicitor “and client to be taxed such costs to include the costs properly “incurred before the issue of the writ and in relation to the “subject-matter of the action.”

On taxation, the taxing-master taxed the costs on the basis that under Or. 22, r. 14, sub-r. 11 (1) the plaintiffs’ solicitors

(1) R. S. C. Or. 22, r. 14, sub-r. 11: “The costs of the “plaintiff . . . in any such cause “or matter or incident to the “claims therein or consequent “thereon shall be taxed by the “Taxing Master . . . as between “party and party and as between “solicitor and client, and the “Taxing Master . . . shall cer- “tify the respective amounts of “the party and party and solicitor

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were entitled to be paid such costs as they would be properly entitled to receive from their own clients. The defendant applied for a review.

H. L. Parker for the Treasury Solicitor.

The plaintiffs were not represented by counsel.

DENNING J. gave the following judgment in open court. The words "taxation as between solicitor and client" have two meanings. The natural and ordinary meaning, which I will refer to as meaning A, is an inquiry as to the costs which a client ought properly to pay to his own solicitor, as distinct from "taxation as between party and party," which is an inquiry as to the costs which he should recover from the opposite side. The distinction is based on common sense, for if a client authorizes his solicitor to incur an unusual or unnecessary expense it is only right that he should reimburse his own solicitor for it, but it does not follow that he should be able to recover it from the opposite side. The other meaning of "taxation as between solicitor and client," a technical meaning, which I will refer to as meaning B, is an inquiry as to the costs to be paid to the solicitor out of a common fund in which the client and others are interested and is substantially a taxation as between party and party, but on a more generous scale. When meaning B is used, a different form of words is needed to describe an inquiry as to the costs which a client ought properly to pay to his own solicitor, and that is then described as a "taxation as between solicitor and "own client."

The plaintiffs' solicitors say that in r. 14, sub-r. 11, and the order as to costs the words are used in meaning A, and they cite the notes to the rule in the Annual Practice, and rely also on the practice of the taxing office. The defendant says that the meaning is meaning B and he cites *Giles v. Randall* (2). The practical difference is pointedly illustrated by the fees of leading counsel in this case. The plaintiffs' solicitors consulted

"and client costs, and the difference (if any) and the proportion of such difference (if any) payable respectively by any adult party to the cause or matter and by or out of the moneys of any party who is an infant or person

"of unsound mind, and no costs other than those so certified shall be payable to the solicitor for any plaintiff in the cause or matter."

(2) [1915] 1 K. B. 290.

one leading counsel, who advised a settlement at 1,900*l.*, and whose fee was 13*l.* 2*s.* The plaintiffs were not satisfied and instructed their solicitors to consult another leading counsel. He advised settlement at 2,500*l.* and his fee was 11*l.* After the second opinion, a settlement was reached at the sum of 2,250*l.* On a taxation according to meaning A the fees of both leading counsel would be allowed, but on a taxation according to meaning B the fee of one leading counsel only would be allowed, because the fee of a second leading counsel would be considered an unusual expense.

In my opinion, in Or. 22, r. 14, sub-r. 11, the words are used in meaning A. The rule is designed to protect widows and children in accident cases by disentitling solicitors from deducting from the compensation a lump sum for their costs and by making their claim for costs subject to taxation, that is, to an inquiry in every case as to the costs properly payable to them. If meaning A is given, that result is achieved, but if meaning B is given, the effect of the sub-rule, especially the concluding words thereof, would be that the solicitor would be deprived of costs properly payable to him. In the present case, for instance, the plaintiffs' solicitors would have to pay the fee of 11*l.* for the second leading counsel out of their own pockets, although the expenditure had been authorized by the plaintiffs and proved, in fact, greatly to the benefit of the estate and the children. I reject an interpretation which would lead to such a result. If I am right in thinking that in the sub-rule the words are used in meaning A, it shows that it is a valid meaning to be attached to them in any legal document, and this enables me to distinguish *Giles v. Randall* (1). The court in that case recognized that meaning A was the natural and ordinary meaning but felt compelled to give the words meaning B because that was the technical meaning; and in a legal document, where words have a technical meaning, it is the technical meaning which should be received. Now that a rule of the Supreme Court has been made using the words in meaning A, it follows that meaning A at the present day is not only the natural and ordinary meaning, but also a valid technical meaning, and that there is no reason why in a legal document that meaning should not be ordinarily given. In the order as to costs in the present case, therefore, there is no reason why I should not adopt meaning A, when that appears to be the meaning intended by the parties, as I think it is. In view of this development it

(1) [1915] 1 K. B. 290.

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Denning J.

may be that *Giles v. Randall* (1) would be differently decided at the present day.

At the instance of the parties and with their consent, I have seen the senior taxing-master who tells me that the practice in cases under Or. 22, r. 14, is to tax according to meaning A., that is, to ascertain the costs properly payable by the client to his own solicitor. In *Giles v. Randall* (1) it is to be noticed that the Court of Appeal were much influenced by the practice of the taxing office. I would hesitate long before I disturbed the present practice. I decline to do so. I hold that the taxation of this bill by the senior taxing-master of this court was on the correct principles and I do not interfere with it.

Application refused.

Solicitors for plaintiff: *Gregory, Rowcliffe & Co.*

Solicitor for defendant: *Treasury Solicitor,*

(1) [1915] 1 K. B. 290.

H. A. P.

C. C. A.

REX v. ROWLAND.

1947

Feb. 10, 17.

Lord Goddard
C.J.,
Humphreys and
Lewis JJ.

Criminal law—Murder—Conviction—Appeal—Application for leave to call fresh evidence—Confession by person other than appellant—Evidence of person making confession—Admissibility.

On an appeal against a conviction on a charge of murder, an application was made on behalf of the appellant for leave to call as a witness a man who, since the trial of the appellant, had confessed that he himself had committed the murder of which the appellant had been convicted:—

Held that permission to call the person making the confession could not be granted. Although his statement called for the most careful investigation, the Court of Criminal Appeal was not the proper tribunal to hold the necessary inquiry, which would involve, in the light of the new evidence, the recalling of many witnesses, and probably the calling of several fresh ones. Further, the court would be compelled to form some view as to the guilt or innocence of the person making the confession and to express that opinion in open court. In effect, they would be trying not only the appellant but also the man making the confession who might, as a result, have to stand his trial for murder, in which event the finding of the Court of Criminal Appeal could not but be prejudicial to him. In the absence of very special circumstances, which did

not exist in the present case, the court would not re-consider the verdict of a jury in the light of fresh evidence.

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APPEAL against conviction.

On December 16, 1946, the appellant, Walter Graham Rowland, was convicted at the Manchester Assizes of the murder of a woman. He appealed against his conviction on grounds not material to this report. On the hearing of the appeal, no complaint was made as to the conduct of the trial or the summing-up of the judge but an application was made on behalf of the appellant for leave to call four fresh witnesses including one David John Ware, a man undergoing a sentence of imprisonment who, on January 24, 1947, made a confession to the effect that he had committed the murder of which the appellant was convicted. The court refused the application, in the case of Ware. They stated that the appellant's appeal would be dismissed and intimated that they would give their reasons in writing.

Kenneth Burke and *H. Openshaw* for the appellant.

Basil Nield K.C. and *Bazil Wingate-Saul* for the Crown.

Feb. 17. HUMPHREYS J. read the judgment of the court, which after dealing with the facts and the application to hear fresh evidence, continued : The fourth witness whom the court was asked to hear was David John Ware. The court was informed that Ware, while a prisoner serving a sentence in His Majesty's Prison, Liverpool, had, on January 24, 1947, made a statement confessing to the murder of which Rowland had been convicted on December 16, 1946. Ware had been in Liverpool Prison awaiting trial from October 23, 1946 to January 15, 1947, when he was sentenced to nine months imprisonment. As an unconvicted person, he would during that time have had free access to the daily newspapers. No one will doubt that such a statement calls for the most careful investigation. Our reason for refusing the application to hear the evidence of Ware was that we were satisfied that the Court of Criminal Appeal is not the proper tribunal to hold such an inquiry. It is no light matter to reverse the finding of a jury who have convicted a person of murder after a trial extending over five days in which twenty-eight witnesses were called. It is obvious that the mere statement of a person such as Ware that the convicted man is innocent because he himself is

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guilty, even if made on oath, would not justify quashing the conviction of that other person, but would only be the beginning of an inquiry which would involve, in the light of the new evidence, the recalling of many witnesses and probably the calling of several fresh ones. The court would certainly require to hear the evidence of the three identifying witnesses after they had been given the opportunity of seeing Ware ; it would probably think it necessary to learn the views of the medical witnesses upon certain aspects of the matter. The prosecution might well ask for leave to call other witnesses to trace the movements of Ware or to give other evidence with a view to showing that no jury would be likely to accept his story as true.

Such an inquiry would be of a totally different character from the simple issue involved in the calling of a fresh witness to speak to some fact connected with the defence put forward at the trial. If we had allowed Ware to give evidence before us, and he had persisted in his confession of guilt, the court would have been compelled to form some conclusion as to his guilt or innocence and to express that opinion in open court. In effect, therefore, the court would have been engaged in trying not only Rowland but also Ware and thereby usurping the function of a jury. It is true that we should not be empowered to pronounce finally upon the issue of the guilt or innocence of Ware, who, as the result of our judgment, might have to stand his trial by jury on this charge of murder. In that event, the finding of this court could not fail to be prejudicial to his chance of an impartial trial.

Now this court has, in truth, no power to try anyone upon any charge. It is not a tribunal of fact but a Court of Appeal constituted by statute to examine into the proceedings of inferior courts in certain cases of conviction on indictment. We have no power even to direct a new trial by a jury ; much less have we the right to conduct one ourselves.

The attitude of the court towards the question of hearing fresh evidence has often been stated. For instance, in the case of *Rex v. Mason* (1), where Mason had been convicted of murder and the leave of the court was asked for several fresh witnesses to be called in support of his appeal, Darling J., giving the judgment of the court refusing leave, observed, after dealing with the facts, as follows : " It is now really asked that there " should be a new trial, which this court is not empowered to " order, and that we should hear certain witnesses whose

(1) (1923) 17 Cr. App. R. 160 ; 161.

" names have been mentioned, and then consider the whole
 " of the trial in the light of that new evidence. This court
 " exercises with very great caution the power given to it
 " to hear fresh evidence because to do so is opposed to the
 " old-established, trusted and cherished institution of trial by
 " jury. This court has to be convinced of very exceptional
 " circumstances before it will reconsider the verdict of a jury
 " in the light of fresh evidence." We find no exceptional
 circumstances in the present case. Upon the hearing of the
 appeal we were not referred to, and we are not ourselves aware
 of, any precedent for granting the present application.

Finally, we are not unmindful of the fact that there exists
 an authority in the person of the Home Secretary, who has far
 wider powers than those possessed by this court, who is not
 bound as we are by rules of evidence, and who has all the
 necessary machinery for conducting such an inquiry as is
 here asked for (1).

We found no legal ground for interfering with the verdict
 of the jury, and accordingly dismissed the appeal.

Appeal dismissed.

Solicitors for the appellant: *T. H. Hinchcliffe & Son,*
Manchester.

Solicitor for the Crown: *Director of Public Prosecutions.*

(1) The inquiry was held, and in the course of it Ware withdrew
 his pretended confession.

P. B. D.

H. v. H.

1947
 Jan. 20.

*Infants—Adoption order—Necessity for consent of person having custody
 of infant—Jurisdiction of court to dispense with consent—Adoption
 of Children Act, 1926 (16 & 17 Geo. 5, c. 29), s. 2, sub-s. 3.*

Lord Goddard
 C.J.,
 Humphreys and
 Croom-Johnson
 JJ.

By s. 2, sub-s. 3, of the Adoption of Children Act, 1926, an
 adoption order is not to be made without the consent of every person
 who is a parent or guardian or has the actual custody of the infant
 or who is liable to contribute to the support of the infant, " Provided
 " that the court may dispense with any consent required by this
 " subsection if satisfied that the person whose consent is to be
 " dispensed with has abandoned or deserted the infant or cannot be
 " found or is incapable of giving such consent or, being a person
 " liable to contribute to the support of the infant, either has

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"persistently neglected or refused to contribute to such support
"or is a person whose consent ought, in the opinion of the court
"and in all the circumstances of the case, to be dispensed with."

On an application for an adoption order the respondent, who had the actual custody of the child, refused his consent, and the justices held that the proviso to sub-s. 3 did not empower them to dispense with that consent :—

Held, that the concluding words of the proviso "or is a person
"whose consent ought, in the opinion of the court and in all the
"circumstances of the case, to be dispensed with" were not limited to persons who failed to contribute to the support of the infant, but applied to any person whose consent was required by the sub-section, and therefore that the justices had jurisdiction, if they thought fit, to dispense with the consent of the respondent.

CASE STATED by justices.

An application was made by the appellant to a juvenile court under the Adoption of Children Act, 1926, for an adoption order in respect of her grandchild.

The following facts appeared from the statement of application presented to the court in accordance with the Adoption of Children (Summary Jurisdiction) Rules, 1926, or were proved or admitted at the hearing. The infant was born in 1941 and was described in the register of births as the daughter of the respondent and N.H., who died in 1944. N.H. never applied for an order adjudging the respondent to be the putative father of the infant. The appellant was the mother of N.H. On the death of N.H. the appellant agreed with the respondent that the respondent should have the custody of the child for four days each week and that the appellant should have the custody of the child for the remaining three days. That arrangement continued until March 1946, after which date the appellant did not have possession of the child.

The respondent was served with notice of the application and appeared at the hearing and refused his consent to the making of an adoption order, whereupon the court was asked on behalf of the appellant to dispense with his consent.

On behalf of the appellant it was contended that justices had an absolute discretion under the proviso to s. 2, sub-s. 3, of the Adoption of Children Act, 1926, to dispense with anyone's consent, where it was necessary for the safety and welfare of the infant so to do.

For the respondent it was contended that the justices had no jurisdiction to make such an order without his consent

and that the concluding words of the proviso, namely, "or is
 "a person whose consent ought, in the opinion of the court
 "and in all the circumstances of the case, to be dispensed
 "with" did not apply to a person having the custody of the
 infant.

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The justices were of opinion that, having regard to the preceding words of the proviso, "either has persistently
 "neglected or refused to contribute to such support," the words in question referred to a person liable to contribute to the support of the infant; that as the respondent was a person who with the appellant had the actual custody of the infant his consent was necessary to the making of an adoption order; and that the proviso did not empower the justices to dispense with that consent. They therefore refused the application.

The appellant appealed.

Douglas Lowe for the appellant.

Pensotti for the respondent.

LORD GODDARD C.J. The sole point that arises in this case is whether the justices, if they should see fit to do so, can make an adoption order without obtaining the consent of the respondent, who is the person having the actual custody of the child. That depends entirely upon the true construction of s. 2, sub-s. 3, of the Adoption of Children Act, 1926.

[His lordship read the subsection and proviso thereto set out in the headnote and continued:] The justices have taken the view that the words "or is a person whose consent ought, in the
 "opinion of the Court and in all the circumstances of the case, to be dispensed with" apply only to the case of a person liable to contribute to the support of the infant. It is said that that person's consent can be dispensed with if he is persistently objecting or refusing to contribute to the support or for some other reason is a person whose consent ought to be dispensed with. On the other hand, it is contended by Mr. Lowe—and, in my opinion, rightly contended—that the last three lines of the proviso apply to any person whose consent has to be obtained but with regard to whom the justices may for one reason or another think in all the circumstances of the case his consent ought to be dispensed with. I am bound to say I attach great importance to the words "and in all the
 "circumstances of the case." The proviso seems to me to be

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C.J.

intended to give the justices the widest possible discretion, and, as I pointed out in the course of the argument, if that be not the right construction, you might have a very remarkable state of affairs. If a person had kidnapped a child against the will of its parents and habeas corpus had not been obtained, so that at the time the application for an adoption order came before the court that person, who had the actual custody of the child, though wrongly, had not been made liable to support it, and might be a most disreputable person, the court would not be able to dispense with his consent ; or you might get a case where a mother had been divorced and the custody of their child had been given to the husband, and then a relative of the husband, knowing the husband had difficulty in looking after the child, came forward and asked for an adoption order, to which the father would consent, but the justices could not dispense with the consent of the mother, who might refuse it from a purely unreasonable point of view merely for the purpose of annoying her husband.

In my opinion, the words in question mean exactly what they say, and are not limited to the case of a person who has failed to contribute to the support of the child, but are intended to apply to any person whose consent ought to be given, so that if such consent is refused and if the justices feel that in all the circumstances of the case it ought to be dispensed with, then it can be dispensed with. I think, therefore, that the case should go back to the justices with an intimation that they can dispense with the consent of the father. That does not mean that they are obliged to dispense with the consent of the father, but that he is a person whose consent can be dispensed with if the justices, in all the circumstances of the case, think it ought to be dispensed with.

HUMPHREYS J. I am of the same opinion. I think the proviso was clearly intended to allow the justices in all the circumstances of the case to dispense with any consent required by the subsection, and indeed those are the opening words of the proviso. I can see no reason why one of the persons, namely, a person who has the actual custody of the infant, who comes within the words "person whose consent is "required by this subsection" should not be a person whose consent may be, in the discretion of the justices if they so consider, dispensed with in a particular case. That is all that this court is concerned with : it is for the justices to decide

whether the consent in the case of this particular person ought to be dispensed with or not.

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Humphreys J.

CROOM-JOHNSON J. Grammatically, I should have thought there was no difficulty about this proviso at all. What the court is empowered to do is to dispense with the consent of any person whose consent is required under the first part of sub-s. 3, and what follows is a category of reasons why the justices may dispense with consent. They are not obliged to dispense with consent for those reasons, but they are matters which they will consider, and, in my judgment, the last three lines after the last word "or" are words of general application giving a general reason for the justices dispensing with consent with regard to a particular person, and are not limited to using that particular reason only for the purpose of looking to see whether the person is, first of all, within the class of persons who are liable to contribute to the support of the infant. I should have thought as a pure matter of English and a pure matter of grammar, any other construction could not be supported. I agree with the order proposed.

Appeal allowed.

Solicitors for appellant: *Gordon Gardiner, Carpenter & Co., for F. H. Carpenter, Brighton.*

Solicitors for respondent: *Haslewood, Hare & Co., for Bosley & Co., Brighton.*

H. A. P.

LEAN v. ALSTON.

C. A.

Practice—Deceased person who was interested in action, but not a party—Appointment of person to represent his estate, for purposes of action—R. S. C. Or. 16, r. 46.

1947
Jan. 20, 21.

Scott,
Morton and
Somervell L.JJ.

R. S. C. Or. 16, r. 46, which provides, inter alia, that the court may appoint some person to represent the estate of a deceased person, who was interested in the matter of an action, for all purposes of the action, is not limited to the representation of the estate of a deceased person, who, before his death, was a party to the action.

Per Scott L.J.: R. S. C. Or. 16, r. 46, is only one application of an inherent power exercised by the Court of Chancery, as expressed in s. 44 of the Chancery Procedure Act, 1852, by which the court

C. A.

always had the power to appoint a person to represent any particular interest in any proceedings.

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LEAN
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APPEAL from Denning J.

After a collision between a motor-cycle on which the plaintiff, Alfred Lean, was a pillion-rider and a motor car of which the defendant, James Alston, was the owner, the plaintiff brought an action claiming damages for personal injuries. John Robert Hawkins, the driver of the motor-cycle, was killed and the defendant desired to appoint a person to represent his estate for the purposes of the action and, on his appointment, to serve upon him a third-party notice. The deceased man had left no will and his widow, when asked if she would take out letters of administration, refused to do so. The defendant then obtained the consent of one Donald Victor Hayden, if he were indemnified in respect of his costs, to act as such a representative, and a district registrar made an order for the appointment of Donald Victor Hayden as a representative of the estate of the deceased man, granting leave, on his appointment, for the defendant to serve upon him a third-party notice. Denning J. allowed an appeal against this order and the defendant appealed to the Court of Appeal.

Berryman K.C. and *Geoffrey Lawrence* for defendant. The decision of the district registrar should not have been reversed. There was power to appoint a representative of the estate of the deceased driver of the motor-cycle for the purposes of the action under Or. 16, r. 46 (1). It appears in the note to the rule in the Annual Practice, 1945, at p. 307 that the application can be made by *ex parte* summons or motion or by notice under Or. 30, r. 5, or at the hearing.

As to the discretion of the court in granting administration, see s. 9, prov. (b) of the Administration of Justice Act, 1928, amending s. 162 of the Judicature (Consolidation) Act, 1925,

(1) By R. S. C. Or. 16, r. 46 :
 " If in any cause . . . it shall
 " appear to the court or a
 " judge that any deceased person
 " who was interested in the matter
 " in question has no legal personal
 " representative, the court or
 " judge may proceed in the absence
 " of any person representing the
 " estate of the deceased person,
 " or may appoint some person to
 " represent his estate for all the
 " purposes of the cause . . .
 " and the order so made . . .
 " shall bind the estate of the
 " deceased person . . . as if a
 " duly constituted legal repre-
 " sentative of the deceased had
 " been a party to the cause . . . "

and *In the Estate of A. B. Simpson (Decd.)* (1). The widow of the driver of the motor-cycle had been asked to take out letters of administration and had refused to do so. As a result, there was no representative of the estate of the deceased on whom the defendant could serve a third-party notice. No doubt, the right of the defendant, at the conclusion of this action, to bring an action against the estate of the deceased man for contribution would not be barred, but such a proceeding would be inconvenient, since the same judge might not try the whole matter and, also, it would be unnecessarily expensive. A material witness might die during the interval between the two proceedings. It is clear that there is power for the court to act under the rule: see *Watts v. The Official Solicitor* (2) and *Pratt v. London Passenger Transport Board* (3). In the last mentioned case the issue was whether under Or. 16, r. 46, the Official Solicitor could be appointed as representative of an estate of a third person, whom the defendants blamed for an accident, without his consent: but it was never suggested that he could not be appointed under the rule with that consent. See also *Joint Stock Discount Co. v. Brown* (4). Order 16, r. 46 is only the application of an inherent power of the court to appoint a person to represent the estate of a deceased person *ad litem*, which was also expressed in s. 44 of the Chancery Procedure Act, 1852.

Cope Morgan K.C. and *Robert Ives* for plaintiff. Order 16, r. 46, provides that the court may proceed in the absence of any person representing the estate of the deceased person. [Somervell L.J. In that case in the absence of a third-party notice could the judge apportion the blame?] Yes, the judge can make a declaration that a deceased person was, say, thirty per cent. to blame and, no doubt, an insurance company might act on that. In any case this rule, as distinguished from s. 9, prov. (b) of the Administration of Justice Act, 1928, only applies to the case where a person who is already a party to the proceedings has died. As between the defendant and the estate of the deceased driver of the motor-cycle there was no cause or matter or proceeding pending in which the deceased person had been interested. Further, if the court has a discretion to make this order, there is nothing to show that the discretion was wrongly exercised by Denning J. He took the view that the order was disadvantageous to the widow of the deceased

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(1) [1936] P. 40.

(3) [1937] 1 All E. R. 473.

(2) [1936] 1 All E. R. 249.

(4) (1869) L. R. 8 Eq. 376.

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man and should not be imposed on her. In any case, the defendants should not be able to appoint as such representative their own nominee with whom they have made arrangements which are not disclosed, but they should appoint the Official Solicitor. The deceased man had no fund which would be available to meet a judgment. Section 1 of the Law Reform (Contributory Negligence) Act, 1945 (see especially sub-s. 3) enables the court to attribute blame to all tortfeasors concerned in an action, alive or dead, whether or not they are sued in the particular action then before the court. In the case of *In re Knight's Estate* (1) the court made an order for a grant of letters of administration to the Official Solicitor of the estate of an intestate killed in a motor car accident under s. 162 of the Judicature (Consolidation) Act, 1925, as amended by s. 9 of the Administration of Justice Act, 1928. The grant was made only ad litem and was to cease on the conclusion of the action. No order here was necessary, but if an order were to be made it should be made under that authority and not to a nominee of the defendant whose arrangements with the defendant were not disclosed.

Berryman K.C. was not called on to reply.

SCOTT L. J. The defendant, the one person sued as liable, desired to get somebody appointed by the court to represent the estate of the deceased driver of the motor-cycle and be, therefore, the person against whom an order might be made for contribution under his statutory rights. Or. 16, r. 46 is expressed to be limited to a cause matter or proceeding in the court; the provision there is that: "If in any cause, matter or other proceeding it shall appear to the court or a judge that any deceased person who was interested in the matter in question has no legal personal representative, the court or judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter or other proceeding" It was contended for the plaintiff before us that the rule does not apply to the present case, because as between the defendant and the widow, or the estate of the deceased driver of the motor-cycle, there was no cause or matter pending; but Mr. Berryman has pointed out that that rule is only one application of an inherent power of the court exercised by the Court of Chancery and expressed in

(1) (1939) 55 T. L. R. 992.

s. 44 of the Chancery Procedure Act, 1852, by which the Court of Chancery and its successor, the Chancery Division, always had the power to appoint a person to represent any particular interest in any proceeding where it thought right to make that appointment.

The question was considered by the Court of Appeal in 1936, in the case of *Watts v. The Official Solicitor* (1). I will read the headnote (correcting a slight inaccuracy in it as suggested by Morton L.J.): "The Official Solicitor, on appointment to represent the deceased's estate in an action in place of a deceased defendant, gave notice of change of solicitors and substituted his name for that of the solicitors on the record as acting for the deceased defendant, who were also the solicitors of the deceased's insurance company. On summons for directions issued by the plaintiff, counsel for the solicitors moved the learned judge to order that the Official Solicitor should leave the control of the defence in the hands of the said solicitors, and that they should remain on the record, and that the notice of change of solicitors should be removed from the file. The learned judge accordingly varied in this sense his original order appointing the Official Solicitor to represent the deceased defendant. The Official Solicitor appealed:—*Held*: as the Official Solicitor had the same right as any other litigant to choose who should be his solicitor and was entitled to act for himself, he was entitled to control the defence of himself as representative of the deceased defendant and the change of solicitor on the record was properly made, and the learned judge had no jurisdiction to make the variation complained of." I have quoted the headnote at length because it shows that this case is a precedent for an appointment comparable to that in the present case made under r. 46. Eve J., said (2): "The application of this rule is of very frequent occurrence in the other division of this court, and I have never heard before that it is not open to the party who is appointed to represent the estate to select in all respects the persons to act as solicitors."

In *Pratt v. London Passenger Transport Board* and *Green v. Vandekar* (3), the headnote says: "In the first case the defendants in an action for personal injuries attributed the blame to a third person, who had since died. He left no estate, but he had been insured against such claims for negli-

(1) [1936] 1 All E. R. 249.

(3) [1937] 1 All E. R. 473.

(2) *Ibid.* 254.

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“ gence by an insurance company. The plaintiff applied under
“ R. S. C. Or. 16, r. 46, for an order that the Official Solicitor
“ should represent the deceased’s estate and be added to the
“ record as a defendant. The order asked was made without
“ the consent of the Official Solicitor. In the second case, the
“ facts were similar, except that the deceased was one of the
“ defendants in the action, and that the order was made without
“ the knowledge of the Official Solicitor. The Official Solicitor
“ appealed in both cases,” and it was held that there was
no power under Or. 16, r. 46, to appoint a representative
without his consent, but the power of the court to appoint was
there recognized in a case similar in its circumstances to the
present action. The old practice in the Court of Chancery is
illustrated in *Joint Stock Discount Company v. Brown* (1), the
headnote of which says : “ Where a defendant to a bill which
“ prayed relief against all the defendants jointly in respect of an
“ alleged breach of trust as directors, died abroad, and the
“ evidence showed that he was believed to have left a will, and
“ to have named his widow executrix, but that she had not seen
“ the will, and did not know its contents, and that his solicitors
“ on the record had not been instructed since his death :—
“ The court, on the application of the plaintiffs, made an order
“ for the appointment of a person named by the plaintiffs, and
“ consenting to act, to represent the deceased defendant for the
“ purposes of the suit.” There the court made an appointment,
and although it said that it could not appoint a person unwilling
to act, the appointment was good if the person was willing so
to act.

In the present case there is no question that the widow
herself has been given an opportunity to appear and has elected
not to appear, and a person was appointed to represent the
deceased motor-cycle driver by the district registrar ; but the
learned judge thought either that there was no power, or that, in
his discretion, he ought not, to make the appointment. I am
satisfied that there was power and that the appointment ought
to be made for the reason that under the statute the defendant
here may have a right of contribution against the estate of the
deceased driver of the motor-cycle on the ground of his having
been negligent. The plaintiff has no interest in putting a third
party on the record as a defendant, and no doubt decided not
to sue that third party and make him a co-defendant with the
owner of the motor-car because he thought the estate was small

(1) L. R. 8 Eq. 376.

and that so long as he proved some act of negligence on the part of the servant of the owner of the motor-car, he was sure to get his judgment. It mattered to him nothing, whether or not a second defendant could be held liable ; it was sufficient to show some negligence by the servant of the owner of the motor-car. Why he objected to the order appointing a representative of the estate of the deceased man I find it difficult to understand ; but Mr. Cope-Morgan succeeded in convincing the learned judge below that it was wrong to make the order and satisfied the judge that he had a discretion to refuse to make it.

My own view is that it was obviously right to make the order, and for this very simple reason : if the case is decided with the representative of the estate of the deceased motor-cycle driver present as a third party, the question of contribution will be decided by the judge after hearing evidence in the action and at the minimum of expense to the two parties concerned in the question of contribution. If he did not hear it with the representative of the estate of the deceased motor-cycle driver present, it is true that the right of the defendant to bring an action for contribution afterwards would not be barred, but it would be an obvious waste of money to have a second trial all over again, and it might be very unfair to the defendant because a material witness might in the interval have died. On the ground of discretion alone, it seems to me obviously right that an order should be made. The appeal must, therefore, be allowed with costs and the appointment of the representative of the estate of the deceased motor-cycle driver confirmed, in order that the third-party notice may be duly served.

MORTON L.J. I agree, and I only wish to add a few observations on two arguments presented to us by Mr. Cope-Morgan. He first submitted that Or. 16, r. 46 only applied in a case where a person already a party to proceedings had died and there was no legal personal representative of such party. In my view that argument cannot be accepted. In the first place, it seems to me that the wording of the rule is clearly against it. The rule says : " If in any cause, matter or other proceeding " it shall appear to the court or a judge that any deceased person " who was interested in the matter in question has no legal " personal representative." I can see no ground for confining those words to deceased persons who have been parties to the proceedings. In the second place, I think there is direct

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authority which shows that is not the proper interpretation of the rule. I refer to the case already mentioned by my Lord, *Pratt v. London Passenger Transport Board* (1). As I read the facts in that case, the person whose estate the Official Solicitor was appointed to represent was not a party to the litigation. The facts were very like the facts in the present case. It is true that in *Pratt's* case the question was whether the Official Solicitor's consent was necessary, but nobody suggested that the Official Solicitor could not be appointed because the dead man was not a party to the litigation. Finally, within my own experience, although no case was cited to us on the point, it is very common in the Chancery Division for a person to be appointed to represent the estate of a deceased person under this rule, when such deceased person has never been a party to the litigation. One of the most common cases is where there is a doubt as to the true construction of a will; the trustees of the will take out an originating summons and it is their duty to make parties to that originating summons the persons who are interested in putting before the court various different constructions of the will. It often happens that some person who, if alive, would have a very direct interest in putting an argument before the court is dead, and has no legal personal representative. In these circumstances, it is the usual practice for the Chancery Division to appoint a person to represent the estate of the deceased person under this rule. I have never heard it suggested until to-day that that could not be done unless the deceased person had been a party to the litigation at some stage.

The other argument upon which I desire to make a few observations is this: Mr. Cope-Morgan pointed out, quite truly, that this is a matter for the discretion of the learned judge, and that this court would not interfere with the exercise of a judge's discretion unless satisfied he had acted upon some wrong principle. Mr. Cope-Morgan also informed us that the learned judge refused to make the appointment, because he did not think that the widow of the deceased motor-cyclist, being a person beneficially interested in his estate, should have this representative "imposed upon her." If that is what influenced the mind of the learned judge, I think he did exercise his discretion on a wrong principle. In this case, the widow was invited to represent her husband's estate and she declined to do so, it may be for a very good reasons, not unconnected

with the question of costs. For all we know, the widow may be glad that another person (who is, we understand, to be indemnified in respect of his costs by the defendant) should represent her husband's estate, and it may well be that in the long run it will save that estate the expense of a subsequent trial, and possibly of an application to the Probate Division to appoint a personal representative. I would only add that, although the plaintiff took upon himself the burden of saying what the widow would or would not desire, I do not see how he is in a position to inform the court as to that. He does not appear for the widow, and for my part I think it is quite possible that the widow would desire the whole matter to be fought out in this action, in order to avoid the possibility of proceedings in the future. I agree that this is a case in which this court has jurisdiction to make the order, and in all the circumstances of the case the order should be made.

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SOMERVELL L.J. I agree, and I do not desire to add anything to what has been said by my Lords.

Appeal allowed.

Solicitors for defendant: *Berryman's, for Hill & Perks, Norwich.*

Solicitors for plaintiff: *Butt & Bowyer, for Daynes, Keeffe & Durrant, Norwich.*

C. G. M.

Followed. MARSH v. MOORES. [1949]
2 All E.R. 27.

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Road traffic—Third party insurance—Driver of motor vehicle under age limit—No driving licence and disqualified for holding or obtaining licence—Employers having no express knowledge that driver was under age and without licence—Failure to make inquiry—Constructive knowledge—Exceptions clause in policy of insurance—Person causing or permitting another to use vehicle on road—User covered by policy of person permitting—No necessity for additional policy covering person permitted—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 35.

Lord Goddard
C.J.,
Humphreys and
Lewis JJ.

Appellants were convicted by a court of summary jurisdiction on an information charging them with unlawfully permitting their motor wagon to be driven on a public road when there was not in force in relation to the user of the vehicle by the person using it,

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such a policy of insurance as complied with the requirements of the Road Traffic Act, 1930, contrary to s. 35 of that Act (1). The driver in question was a youth under seventeen years of age. He did not hold a driving licence and by reason of his age was disqualified for holding or obtaining one. These facts were not known to the appellants, they having been informed by the driver that he held a driving licence and had driven for several other firms. The appellants had not, however, taken any step to verify the driver's statements. They were themselves the holders of a policy of insurance which covered third-party risks in connexion with the said vehicle, subject, however, to the general exception that the company would not be liable in respect of any claim arising whilst the vehicle was being driven with the general consent of the insured or of his representative by any person who, to the knowledge of the insured or of his representative, did not hold a licence to drive such vehicle, unless such person had held and was not disqualified for holding or obtaining such a licence. On appeal the conviction was affirmed by the Appeals Committee of quarter sessions, who were of opinion that the appellants, having recklessly failed to take steps to ascertain the truth of the driver's statement, must be taken to have known what inquiry would have revealed, and therefore by reason of such knowledge they were not within the cover of the policy and there was not in force at the material time a policy of insurance which complied with the requirements of the statute. The appellants appealed :—

Held, that for the purpose of the exceptions clause of the policy "means of knowledge" was not the same as "knowledge" and the appellants having no knowledge that the statements of the driver were untrue were covered by a policy which complied with the requirements of the Road Traffic Act.

Held, also, that where a person who causes or permits another person to use a vehicle on the road holds a policy covering such user, he is not required by s. 35 of the Act to see that there is in existence a separate policy in relation to the person whom he causes or permits to use the vehicle.

CASE RESTATED by Appeal Committee of the Court of Quarter Sessions for the Hundreds of Amounderness, Blackburn and Leyland, Lancashire, pursuant to the order of the Divisional Court.

At a court of summary jurisdiction for the petty sessional

(1) Road Traffic Act, 1930, s. 35, sub-s. 1: "Subject to the provisions of this part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to

"the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this part of this Act."

division of Kirkham, sitting at Lytham, on July 19, 1943, an information was preferred by W. T. Hinds (hereinafter called the respondent) under the Road Traffic Act, 1930, against J. T. Ellis, Ltd. (hereinafter called the appellants,) for that on June 18, 1943, at St. Annes in the county of Lancashire, they unlawfully permitted Charles Desmond McDonald to use a motor vehicle on Clifton Drive North when there was not in force in relation to the user of the vehicle by the person using it such a policy of insurance as complied with the requirements of Part II of the Road Traffic Act, 1930, contrary to s. 35 of that Act. The information was heard on July 19, 1943, when the court of summary jurisdiction found the appellants guilty and fined them 20s.

On the hearing of the appeal by the appellants to the appeal committee, the notes of evidence taken by the clerk to the justices were accepted by both parties as comprising the evidence before the appeal committee and no witness gave evidence. Subject as aforesaid the following facts were proved or admitted.

On June 18, 1943, the appellants permitted MacDonald to use a motor wagon on a road at St. Annes, and while MacDonald was driving the vehicle in the course of his employment by the appellants, a collision occurred between the wagon and a motor omnibus. At the time MacDonald was under seventeen years of age and did not hold a licence to drive the vehicle and had never held such a licence, and was disqualified for holding such a licence. At the material time there was in force in relation to the said vehicle a policy of insurance, taken out by the appellants, covering the liability of third parties, which was, however, subject to the following qualifications and exceptions.

By para 2 of cl. 1 of the policy (liability to third parties) it was provided: "In the terms of and subject to the limitations of and for the purposes of this section the company will treat as though he were the insured any person who is driving such vehicle on the insured's order or with his permission provided . . . (c) that such person holds a licence to drive such vehicle or has held and is not disqualified for holding or obtaining such a licence."

By the General Exceptions in the said policy it was provided: "The company shall not be liable in respect of any claim arising (1.) whilst such vehicle is (c) being driven with the general consent of the insured or his representative by

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“ any person who to the knowledge of the insured or of such
“ representative does not hold a licence to drive such vehicle,
“ unless such person has held and is not disqualified for holding
“ or obtaining such a licence.”

The appellants had no express knowledge of the fact that at the material time the vehicle was being driven by a person who did not hold a licence to drive it and had never held such a licence, and was disqualified for holding or obtaining such a licence. MacDonald had stated when engaged that he held a licence and that he had already driven for several firms, including Cooksons of Lytham. A request by those responsible for the management of the appellants' firm to MacDonald to produce the licence, and an investigation of his statement that he had already driven for several firms, would have revealed the true facts, but the appellant firm recklessly omitted to take any of the said steps. The insurance company which issued the above mentioned policy of insurance to the appellants at first disputed liability thereunder, but subsequently, after the date of the conviction by the justices, agreed to indemnify the appellants against any claim that might be made against them in respect of the collision.

On behalf of the appellants it was contended that there was in force a valid policy of insurance in relation to the user by the person using the vehicle ; that the justices were wrong in law in convicting the appellants of an offence under s. 35 of the Road Traffic Act, 1930 ; that the appellants did not know MacDonald had no licence to drive and was disqualified for holding or obtaining one ; and that the insurance company concerned, despite the facts that McDonald held no licence and was not entitled to hold one, and was not himself covered by insurance, had nevertheless agreed to indemnify the appellants and was bound in law so to do.

For the respondent it was contended that MacDonald was not at the relevant time covered for third-party risks and therefore there was not in force in relation to the user of the vehicle by the person using it such a policy of insurance as complied with the statutory requirement, and that it was no defence for the appellants to say that they did not know that MacDonald was too young to be qualified for holding a driving licence, as they had not asked for the production of such licence.

The appeal committee were of opinion (a) that at the material time MacDonald was not himself entitled to be treated as insured under the appellants' policy of insurance ;

(b) that if at the material time the appellants themselves were within the cover of the said policy of insurance, no offence would have been committed by them even though MacDonald was not entitled to be treated as insured thereunder ; (c) that the appellant firm ought to have asked to see the licence and ought to have inquired into the truth of MacDonald's statement, and having recklessly failed to do so must be taken to have known what such request and inquiry would have revealed, namely, that MacDonald did not hold a licence and was disqualified for holding or obtaining one ; (d) that by reason of such knowledge on the part of the appellants they were not within the cover of the said policy in respect of the circumstances of the case, and there was not in force such a policy of insurance in relation to the circumstances of the case as complied with the requirements of Part II of the Road Traffic Act, 1930 ; (e) and, that the fact that after the date of the conviction the insurance company agreed to indemnify the appellants was not relevant to the proceedings before the appeals committee.

Accordingly, the committee held that the offence charged had been committed by the appellants, and affirmed the decision of the court of summary jurisdiction.

The appellants appealed.

Harold Lever for appellants. This policy covers any employee of the assured driving with his permission, irrespective of whether the employee does or does not hold a driving licence, unless the assured knows that the servant does not hold a driving licence. No evidence was adduced to show that the assured did know, and it was conceded by quarter sessions that knowledge must be proved, but it was held that the assured would have known the fact if they had not recklessly failed to make inquiries and ask to see the licence. Quarter sessions appeared to hold that failure to make reasonable inquiry amounted to knowledge. The policy is a valid policy, the insurance company is not entitled to avoid it, and on their findings quarter sessions ought to have allowed the appeal.

O'Malley for the respondent. Firstly, the policy of the appellants was not a valid one since the general exceptions in it exempt the insurance company from liability if the insured knows that the person he permits to drive has no licence to drive and is disqualified for holding or obtaining a licence. "Knowledge of the insured" means not merely express knowledge but knowledge which ordinary reasonable steps

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would have enabled the insured to acquire, and it is implied in the policy that such steps shall be taken. But even supposing that the policy was a valid one so far as the appellants were concerned they were still properly convicted of the offence charged because on a proper construction of ss. 35, 36 and 39 of the Road Traffic Act, 1930, a person who causes or permits his vehicle to be on the road must not merely be insured himself but must also see that the driver, whether his servant or a person whom he permits to drive, is also insured. That is the way in which insurance companies have interpreted s. 35 of the Act. Support for this view is to be found in the reasoning of Atkinson J. in his judgment in *Sutch v. Burns* (1). It is true that that case cannot be cited as an authority because when it went to the Court of Appeal (2) the court refused to entertain the appeal for the reason that Atkinson J. had, by consent, decided the case on hypothetical facts in regard to the policy there in question. They, therefore, dismissed the appeal without expressing any opinion regarding the grounds on which Atkinson J. based his decision. It is submitted, however, that the views he expressed in regard to the necessity for a second policy on the actual driver of a vehicle which he is permitted to use, support the contention for the respondent in the present case.

Harold Lever in reply. The provisions of the Road Traffic Act, 1930, are quite clear. Section 35, sub-s. 1, provides that a person may not use or cause or permit a vehicle to be used on the road unless there is a policy in force covering the use of the vehicle. Here the use of the vehicle was covered, if, as submitted, the appellants' policy was a valid one, but the actual driver was not himself insured. If the policy of the owner of the vehicle or of the permitted person is in force, that is sufficient. Section 35 does not say that anybody is to be insured at all, but merely that a policy must be in force. The appellants' driver was using the lorry with their authority; there was a policy in force which would protect third parties and there is no necessity to have an additional policy in respect of the driver. All that the Act requires is that somewhere there must be an act done which covers all third-party claims, as the appellants' policy did here. The appellants committed no offence and the appeal should be allowed.

Cur. adv. vult.

(1) [1943] 2 All E. R. 441.

(2) [1944] K. B. 406.

Feb. 7. LORD GODDARD C.J., having stated the facts, continued: Quarter sessions found that the appellants had no express knowledge of the fact that MacDonald was unlicensed and was not qualified to obtain a licence. He had told them that he held a licence, that he had already driven for several firms, including one that he named. They also held that a request to McDonald to produce his licence and an investigation of his statement, would have revealed the fact that he did not hold a licence, and they found that the appellants recklessly omitted to make those inquiries, and they give as their opinion (a) that McDonald was not himself entitled to be treated as insured under the policy of insurance; (b) that, if at the material time the appellants themselves were within the cover of the said policy of insurance, no offence would have been committed by them, even though the said McDonald was not entitled to be treated as insured thereunder; (c) that the appellant firm ought to have asked to see the licence and ought to have inquired into the truth of his statements, and having recklessly failed to do so, must be taken to have known what such request and inquiries would have revealed, namely, that McDonald was unlicensed; (d) they further held—and this and the last preceding findings are clearly matters of law—that by reason of such knowledge on the part of the appellants, they were not within the cover of the said policy of insurance in respect of the circumstances of this case, and that there was not in force such a policy of insurance in relation to the circumstances of this case, as complied with the requirements of Part II of the Road Traffic Act, 1930.

The first question in the case is whether at the material time the appellants were protected by an existing policy of insurance taken out in respect of the vehicle.

The question whether the appellants were unable to rely on the protection of the policy by reason of their having recklessly failed to make the inquiries referred to, or require the production of the licence, depends on the terms of the policy. If the insurance company would have been entitled to refuse to indemnify the appellants, the offence was committed; if they were not, no offence had been committed. The matter turns entirely on an exception clause in the policy. By that clause the company is exempted from liability whilst such vehicle is being driven with the general consent of the insured or of his representative by any person who, to the knowledge of the insured or of such representative, does not hold a licence to

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drive such vehicle, unless such person has held and is not disqualified for holding or obtaining such a licence. Quarter sessions have held that in fact the appellants had no knowledge that McDonald was not licensed. In holding that the appellant recklessly omitted to make inquiries, I understand them to mean no more than that the court considers they were extremely careless in not making the inquiries. If they meant more than that, it would have been the duty of quarter sessions to state it in plain terms. If a man deliberately shuts his eyes to the obvious, he has as much knowledge as if he were expressly told the fact to which he has closed his eyes. But it is quite another thing to say that because a man has means of knowledge of which he does not avail himself, therefore he has knowledge. In matters relating to the law of negligence, where the alleged negligence depends on the state of mind or knowledge of a person, knowledge and means of knowledge may often have the same result. If a person does not know of something which it is his duty to know and which he therefore ought to have known, he cannot plead his lack of knowledge. But it is fallacious to say that in all cases knowledge and means of knowledge are the same thing. It will be observed that this clause is an exception clause, and exception clauses always receive a strict construction. It is true that in some cases on the law of insurance relating to non-disclosure of material facts, it has been held that if an applicant for insurance ought in the ordinary course of his business to have known certain facts material to the proposed risk and ought to have known those facts before making his application, he must be treated for the purposes of disclosure as having known the facts in question, and he cannot rely on his ignorance of the facts due to the negligence of himself or his servants in the conduct of his business: see, for instance, *London General Insurance Co. v. General Marine Underwriters* (1). So, too, if an intending assured answers certain questions which it is agreed shall form the basis of the contract and gives an unqualified answer which turns out to be untrue, it is no answer for him to say: "I did not know it." That is because he has given an unqualified answer which is made the basis of the contract, and if it is untrue, it matters not whether he could have found that out or not. The untruth is fatal though he did not know it to be untrue.

But, in my opinion, entirely different considerations arise when we are dealing with an exception clause. It is always for

(1) [1921] 1 K. B. 104.

the underwriters to prove the necessary facts to establish the exception, and to escape liability on this policy they would have had to prove that the appellants knew that McDonald was uninsured. They do not prove that by proving that if the appellants had made some inquiries they would have known that he was uninsured. The exception clause does not, in my opinion, place any duty upon the assured to make inquiries, the absence of which would enable the insurers to take advantage of the exception clause. Of course, if the court finds, as I have already said, a wilful shutting of the eyes to the obvious, that only means that they find that in fact the assured did know the facts. I can find no case in which it has ever been held that a company could take advantage of an exception clause in these circumstances. It would, of course, be open to them to insert in their policies a clause which would enable them to take advantage of the exception if the assured knew, or might by reasonable inquiry have ascertained, that the driver was not insured, but I am certainly not inclined to read into this clause any such provision. What quarter sessions have really held in this case is that the assured would be estopped as against the insurance company from denying that they knew a fact because they might have discovered it if they had made inquiries. There is nothing here to suggest that quarter sessions intended to find that the assured did not act honestly. An honest man may often believe a liar, although a person equally honest but wiser would have made further inquiries which would have disclosed the untruth. I am not prepared to hold that for the purpose of this exception clause means of knowledge is the same as knowledge. To do so would be to open the door to an admission of the doctrines with regard to constructive notice being incorporated into the law of insurance. It would, I think, be as disastrous in the case of policies as it would be in the law of negotiable instruments, and I may quote the words of Lord Herschell in *London Joint Stock Bank v. Simmons* (1), where he said: "I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith." Let me say, in parenthesis, that with regard to bills of exchange it is expressly provided that a thing is deemed to be done in good faith where it is in fact honestly done, whether it is done

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negligently or not : (Bills of Exchange Act, 1882, s. 90.) Lord Herschell continued : " If there be anything which excites the " suspicion that there is something wrong in the transaction, " the taker of the instrument is not acting in good faith if he " shuts his eyes to the facts presented to him and puts the " suspicions aside without further inquiry."

I can see nothing which would justify it being held, and in fact quarter sessions have not held, that there was anything in this case to excite suspicion in the minds of the appellants. It is satisfactory to know that, in fact, the insurance company in this case did not seek to take advantage of the exception clause, because I have no doubt they recognized that it did not apply to the facts of this case.

Dealing now with the second branch of Mr. O'Malley's argument, it was not disputed that at the material time any liability of the appellants for personal injury caused by the negligent driving of their servant was covered by a policy unless the exception clause applied. Mr. O'Malley argued, however, that it was necessary that there should be in force a policy which would also have covered the liability of the driver ; admittedly there was no such policy and therefore he contended that the appellant company had not complied with s. 35 of the Act, and were guilty of an offence on that ground. The section provides that it shall not be lawful to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person as the case may be, such a policy of insurance as complies with the Act. It is to be observed that the section says nothing about driving ; it refers to the use of the vehicle. No doubt the owner of a car who drives himself uses the vehicle, but so he does if it is driven on his account by his servant. Where the statute deals with matters relating to driving, for instance in ss. 5, 9 and 15, it uses the word " drives." A person who rides in his car while it is being driven by someone else or who sends his driver out with his motor vehicle on business, uses, but does not drive, the vehicle. In the latter case, clearly, he causes his driver to use the vehicle. If when the owner is driving, or the car is being driven by a servant on the employer's business, so that the owner would come under a liability if death or personal injury is caused to a third person by the negligence of the driver, and the liability of the owner is covered by insurance, in our opinion it is clear that there is in force in relation to the user

of the vehicle whether by the owner or driver, a policy of insurance. The appellants in this case were using the vehicle which was being driven by their servant. If their liability for accidents was covered, there was in force a policy in relation to the user of the vehicle by another person although that person's separate liability would not be covered. If the owner of a car who has covered his own liability by a policy lends it to a friend he will commit an offence unless either his own policy extends to cover liability incurred by the friend while driving, or the friend has a policy which will indemnify him while he is driving another person's car. It is not unusual for an owner to effect a policy which covers only liability incurred either by himself alone or by himself and another named person; in such a case use of the car by any other person would not be covered by the policy.

We must now refer to the judgment of Atkinson J. in *Sutch v. Burns* (1) on which Mr. O'Malley relied, but with which, with all respect, we are unable to agree. The facts of that case appear to be that a company called Convoys, Ltd., owned a motor lorry which was driven by one of their men. He took a load of goods to the premises of Mono Containers, Ltd. So far he was acting within his employment by Convoys, Ltd. The foreman of Mono Containers, Ltd. asked him, apparently as a favour, to take some of their goods to another branch of their business and while he was doing so an accident happened. The injured person sued both Convoys, Ltd. and the driver. Wrottesley J. who tried that action, entered judgment against the driver and dismissed the action against Convoys, Ltd., obviously for the reason that the driver was not acting as their servant while he was doing this work for Mono Containers, Ltd. Atkinson J. held that the underwriters ought to have granted Convoys Ltd. a policy which would have insured their driver while he was doing this work for Mono Containers, Ltd.; at least, that is how we understand the judgment. With this we cannot agree. A company which employs men to drive their vehicles must take out a policy which will cover the user of the vehicles by their servants, but only while they are being driven on the company's business, because if the company's servants are driving on their own account, or are using their masters' vehicles without authority, the master has neither caused nor permitted the use of the vehicles.

If we understand the judgment aright, it would mean

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that the owner of a car was bound to have a policy which would cover the liability of his chauffeur who had taken out his master's car for what is commonly called a joy ride and caused personal injury to a third party while so doing. If a driver, the results of whose negligence would be covered by his master's policy when driving for him, drives under circumstances which absolve the master from liability, he commits an offence against the section, but the master does not. We desire to make it clear that we differ from the learned judge because it seems to us clear that Wrottesley J. must have held that the employers of the driver were not liable because he was not driving on their business when the accident occurred. We can see no ground, therefore, on which the employers would be bound to have a policy which would have insured him (the driver) in those circumstances, since they had not permitted him to drive, and if they had, their own policy would have covered the accident. For the reasons I have given the appeal must be allowed and the conviction quashed.

HUMPHREYS J. The first point taken by Mr. O'Malley seems to me to turn on the meaning of the word "knowledge" in the exceptions clause. The absence of express knowledge is plainly not conclusive. Knowledge may be implied from circumstances. During the argument I was much impressed by the contention of Mr. O'Malley that quarter sessions had found knowledge on the part of the appellants that their servant was not insured, and they found that on evidence sufficient to support that inference from the facts. They, in fact, found that the appellants were reckless in their failure to make inquiry. I take the view that the word "reckless," means a great deal more than negligence, and in this class of case one may turn to ss. 11 and 12 of the Road Traffic Act to see what great differences there may be to a person as the result of his having driven a motor car negligently, that is without due care and attention, or recklessly, since in the latter case he is liable to more serious penalties than in the former. That is their finding. They have not, however, found in terms that there was knowledge, and both my Lord, and, as I understand, my brother Lewis (who are far more familiar with insurance law than I am) are of opinion that the doctrine of constructive notice, which in this case might be said to be constructive knowledge, ought not to be applied to an exception clause in the policy. The finding that the appellants must be taken to have

known would, I think, in other circumstances be equivalent to a finding that they did know, but in this case I do not think that the appellants should be convicted unless the court has made an unequivocal affirmative finding that they had the requisite knowledge.

With regard to Mr. O'Malley's second line of argument I agree with the judgment delivered by my Lord, but I will add a few words of my own. In this case the driver of the motor vehicle, McDonald, was unlicensed and uninsured. He was driving the vehicle on a road and was employed for that purpose by the appellants. In my opinion the appellants would have had no defence to a charge under s. 4, sub-s. 1, of the Road Traffic Act, 1930, of having so employed him while he was unlicensed.

The question, however, in this case, as stated, is whether the appellants also committed an offence against s. 35, in permitting him to use the vehicle on the road while he was not covered by insurance. He was undoubtedly one of the persons falling within the expression "persons using the vehicle on the road." Now it is, I think, manifest that not everyone using such a vehicle is required to be covered by insurance. A mere passenger may be said to use the vehicle while he is being given a lift; a person to whom the owner lends his car for the day, with the services of his driver, is one, at least, of the users of the vehicle on that day. If the driver and owner are insured, no one would contend that the borrower, in that case also requires to be covered. The reason, as I think, is that it is not any particular person who uses who is required by s. 35 to be insured; what is required is that the use on the road by the person or persons in fact using, should be covered by insurance in respect of third-party risks.

In the present case, the appellants, as the owners, had a policy which indemnified them against any liability which might be incurred by them in respect of death or bodily injury to any person, arising out of the use on the road of the vehicle. That policy was, therefore, one which complied with the requirements of s. 36, sub-s. 1, of the Act. The contention of Mr. O'Malley is that something further is required by s. 35, namely, an insurance indemnifying the driver McDonald. I find nothing in the section to support that contention. I think the true view of the section is that what must be covered by insurance in respect of third-party risks is the use on the road of the vehicle by the driver. Upon the facts stated in the case, McDonald was driving the vehicle as the servant of the appel-

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lants, and was acting in the scope of his authority. The appellants, therefore, were plainly liable for the consequences of any negligence displayed by McDonald in the course of his driving, and no such question arises as that which Atkinson J. purported to decide in the case of *Sutch v. Burns* (1). If that learned judge is to be taken as having held that in every case of a motor vehicle on the road driven by a servant of the owner, both the driver and the owner must be covered by insurance, I respectfully differ from his view. As my Lord has pointed out, no insurer, when insuring the owner of a vehicle to be driven by servants, agrees to cover those servants when driving on their own account, or using the vehicle without authority, as was the case in *Sutch v. Burns* (1). To give effect, therefore, to the judgment of Atkinson J. it would be necessary to construe s. 35 as requiring every driver of such a vehicle to take out a policy of insurance in precisely the same way as he is required by s. 4 to take out a licence to drive, and I cannot agree that such is the effect of the section.

LEWIS J. I have had an opportunity of reading and considering the two judgments which have been given, and can only say I agree with them, and have nothing to add.

Appeal allowed.

Conviction quashed.

Solicitors for the appellants: *J. H. Milner & Son, for Arnold Lever & Co., Blackpool.*

Solicitors for the respondent: *Gibson & Weldon, for T. L. Child, Kirkham.*

[1] [1943] 2 All E. R. 441.

A. W. G.

P. B. D.

Applied. DUCK v. PEACOCK. [1949]
1 All E.R. 318.

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Road traffic—Motor-cycle—User on road—No insurance covering third party risks in force—Conviction—Disqualification for holding licence—Misapprehension of provisions of policy—Honest belief of owner—Reasonable grounds for belief—Special reasons for not imposing disqualification—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 35, sub-ss. 1 and 2.

Order for disqualification made by petty sessions—Appeal to quarter

sessions—No suspension of order pending appeal—Removal of disqualification by quarter sessions—Reversal of order of quarter sessions by High Court—Date from which order of disqualification should run.

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The respondent was convicted by a court of summary jurisdiction on March 20, 1946, for causing his motor-cycle to be used on a road without a policy of insurance, covering third-party risks, being in force in respect of such user, as required by s. 35 of the Road Traffic Act, 1930, and was fined by the justices and disqualified for holding a driving licence for twelve months. At the time of the offence the motor-cycle was being driven by a friend of the respondent, who had previously owned a motor-cycle, but had sold it shortly before. The respondent, who was riding on the pillion seat, himself held a policy of insurance, but it did not cover third-party risks when his motor-cycle was being driven by another person. On appeal by the respondent quarter sessions on May 27, 1946, removed the disqualification. Accepting the statement of the respondent that he believed his friend had kept his insurance in force, and that the user of the cycle was covered either by his own or his friend's policy of insurance, they held that the honest belief of the respondent constituted a "special reason," which enabled them to exercise their discretion under sub-s. 2 of s. 35. They further expressed themselves as satisfied that the safety of the public would not be prejudiced by allowing the respondent to continue to drive. The informant, a superintendent of police, appealed:—

Held (1.) that belief, however honest, cannot be regarded as a "special reason" unless it is based on reasonable grounds; and if an owner of a motor vehicle who does not understand his policy of insurance, neither informs himself of its provisions nor gets advice, he has not reasonable grounds for believing that it covers something which it does not cover; (2.) that the question whether, on the facts found by the court, it is open to it to hold that "special reasons" exist, is one of law and it would be most dangerous to hold that the fact that a man misapprehended the legal effect of his insurance policy was a "special reason"; and (3.) that the unlikelihood that the offender, having learnt his lesson, would again drive without satisfying himself that he was insured, and that, therefore, the safety of the public would not be prejudiced by allowing him to continue to drive, was not a "special reason," though it might be taken into account by the court when deciding whether or not to exercise its discretion.

The justices in petty sessions had not suspended the operation of the order of disqualification pending the appeal to quarter sessions in pursuance of s. 6, sub-s. 2, of the Act. On the question from what date the order should run:—

Held, that the High Court had no jurisdiction to order that the period of disqualification should run from the date of the judgment of the High Court: and that it could do no more than restore the order of petty sessions, with the result that the order for disqualification would not be operative beyond March 20, 1947.

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On March 20, 1946, the respondent, Joseph Alfred Rennison, a blast engine driver at Scunthorpe Steelworks, was charged before the justices of Scunthorpe petty sessions, on an information laid by the appellant, a superintendent of the Lincolnshire constabulary, with causing a motor-cycle to be used on a road without a policy of insurance, covering third-party risks, being in force in respect of such user, as required by s. 35 of the Road Traffic Act (1). The justices convicted the respondent, imposed a fine of 3*l.*, and disqualified him for holding a driving licence for twelve months. The respondent appealed to the appeal committee of the court of quarter sessions for the Parts of Lindsey, Lincolnshire, against the disqualification and the appeal committee on May 27 allowed the appeal and at the request of the appellant stated a case for the opinion of the High Court.

The facts were that on the morning of Sunday, November 25, 1945, the respondent's motor cycle was being driven, with the approval and consent of the respondent, by a person whose name and identity he refused to disclose to the police. The respondent was, at the time, riding on the pillion seat. The unnamed driver was a friend of the respondent. He had owned a motor-cycle until a short time before the day in question, and he and the respondent had been accustomed, in order to save petrol, to ride together to their work on one or other of the cycles. The respondent knew that his friend had sold his motor cycle, but understood that he had the intention to purchase another, and believed that he had kept his policy of

[(1) Road Traffic Act, 1930, s. 35, sub-s. 1: "Subject to the provisions of this Part of this Act, "it shall not be lawful for any "person to use, or to cause or "permit any other person to use, "a motor vehicle on a road unless "there is in force in relation to the "user of the vehicle by that person or that other person, as the "case may be, such a policy of "insurance or such a security in "respect of third-party risks as "complies with the requirements "of this Part of this Act."

Sub-section 2: "If a person "acts in contravention of this

"section, [he shall be liable to a "fine not exceeding 50*l.*, or [to "imprisonment for a term not "exceeding three months, or to "both such fine and imprisonment, and a person convicted of "an offence under this section "shall (unless the court for "special reasons thinks fit [to "order otherwise and without "prejudice to the power of the "court to order a longer period "of disqualification) be disqualified for holding or obtaining a "licence under Part I of this Act "for a period of twelve months "from the date of the conviction."

insurance in force for that reason. The respondent held a policy of insurance which covered him when driving his own motor-cycle, but did not cover third-party risks when the motor-cycle was being driven by any person other than respondent, notwithstanding that such other person might be driving on the respondent's order or with his permission.

The said justices sitting as the appeal committee of quarter sessions were of the opinion—

(1.) That the respondent acted under a misapprehension as to his legal position relating to insurance ; (2.) that he honestly believed that the user of the motor-cycle was covered as required by the Road Traffic Act, 1930, either by his own or the unnamed driver's policy of insurance ; (3.) that whilst such belief was no defence to the charge preferred against him under s. 35 it nevertheless constituted a " special reason " such as would enable them to exercise their discretion and order that he be not disqualified for holding or obtaining a licence to drive a motor vehicle ; (4.) that the safety of the public would not be prejudiced by allowing the respondent to drive motor vehicles, because they were satisfied that there was no likelihood that he would in the future drive or cause or permit a motor vehicle to be driven without making certain that such user was covered by a policy of insurance, as required by the said section ; (5.) that in considering whether or not there existed " special reasons " within the meaning of the said section any personal hardship sustained by the respondent by reason of his being unable to use his motor-cycle as a means of transport between his home and his place of work should be disregarded ; and (6.) that in the circumstances there existed " special reasons " within the meaning of the section.

They therefore ordered that the appeal should succeed and that the disqualification for holding a licence to drive a motor vehicle should be removed.

The appellant appealed.

James MacMillan for the appellant. It is not sufficient to have an honest belief. The belief must be based on reasonable grounds. There is already clear authority that forgetfulness is not a special reason, and erroneous belief with regard to insurance of another person is in no different position. Whether there are special reasons or not is a question of law and not of discretion : *Muir v. Sutherland* (1). The court below have set

(1) 1940 S. L. T. 403.

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out the facts which they say constitute the special reason, but the question whether those facts do constitute a special reason is a question of law for this court. The immediate issue is whether there are reasonable grounds shown for the respondent's belief. The case does not suggest that he gave any very serious consideration to the question whether his friend had kept alive his insurance policy. The opinion of quarter sessions that the respondent is not likely to commit such an offence again is a matter which may be taken into consideration but it is not a special reason. The decision in *Whittall v. Kirby* (1) covers the point in this case.

R. C. Vaughan and *John Hobson* for respondent. The circumstances are unusual, but the appeal committee had evidence on which they could find there were special reasons which justified the granting of the appeal against disqualification. The period of disqualification is intended to be imposed for the defence of the public in the future and not as a part of the punishment of the offender.

[LORD GODDARD C.J. I should have said it was in many cases the principal part of the punishment.]

Its primary purpose is, if possible, to protect the public by keeping offenders off the road. That appears to be the view of both the Irish and the Scottish courts. In these cases the court should inquire whether it was dealing with a wantonly careless man or a man who had been led by a combination of circumstances to form an honest belief. If the appeal committee concluded that the respondent had been led by such a combination of circumstances to form his conclusion, then there were circumstances which justified them in holding that there was reasonable belief. It is submitted that the appeal committee had evidence before them on which they could find, not that the respondent was reasonable in relying on his own policy, but that he had reasonable grounds for his belief that there would be corresponding cover for the unnamed driver of the motor-cycle.

Cur. adv. vult.

Jan. 31. LORD GODDARD C.J. The judgment I am about to deliver is the judgment of the court. This is a case stated by the appeal committee of the quarter sessions for the Parts of Lindsey, who allowed an appeal by the respondent against so much of a conviction by a court of summary jurisdiction at

(1) Ante p. 194.

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Scunthorpe as adjudged that he be disqualified from holding a driving licence for a period of twelve months. The case again raises the question of what can constitute special reasons entitling a court to refrain from imposing disqualification, on this occasion for causing a motor vehicle to be used on a road without a policy of insurance being in force, contrary to s. 35 of the Road Traffic Act, 1930. In the recent case of *Whittall v. Kirby* (1), this court was considering disqualification for an offence against s. 14 of the Act, and gave no final decision as to s. 35, though it is clear from the judgment in that case that many, if not all, the considerations which should influence the court in considering this matter apply equally to both sections. Thus, the circumstances must be special to the offence and not to the offender, and, as indeed the appeal committee held, financial hardship cannot be taken into account.

The facts of the present case are that the respondent was the owner of a motor-cycle, and on the day in question it was being driven by a friend of his, the respondent at the time riding as a pillion passenger on the cycle. The friend had owned a motor-cycle and he and the respondent were accustomed to ride to work together, on one or other of the cycles. The friend had sold his cycle a few days before the offence, and quarter sessions have accepted the respondent's evidence that he knew his friend was looking out for another, and also, that he believed the friend had for this reason kept his policy in force. On the occasion of the offence these two men appear to have been on a poaching expedition, which was the reason why the respondent would give no information as to the identity of his friend, so that no inquiry whether the latter had a policy in force covering him while driving a cycle owned by another person was possible. The policy insuring the respondent covered him while driving his own or any other motor-cycle, but did not cover a person other than the assured who might be driving the insured cycle. It is indeed common ground that the motor-cycle was in fact uninsured at the material time. In the case as originally stated, the appeal committee found that the respondent acted under a misapprehension as to his legal position relating to insurance; that he honestly believed that the user of the motor-cycle was covered either by his own or his friend's policy; and that such belief constituted a special reason for not imposing disqualification. They added that they disregarded financial hardship, and set out also another consideration upon which we shall say a word hereafter.

(1) Ante p. 194.

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We remitted the case for further information as to the grounds on which the respondent based his belief, and, in their further statement, the committee tell us that he did not give any grounds for believing either that his friend was going to buy another cycle, or that he had kept his policy in force, but the committee thought he was an honest witness and accepted his evidence as to his belief. They also, we think, must have thought that the respondent believed that his own policy covered third-party risks while it was being driven by his friend.

We are in agreement with decisions given in Scotland that the question whether, on facts found by the court, it is open to them to hold that special reasons exist, is one of law. Can, therefore, the fact that a man misapprehends the legal effect of his policy be a special reason? In our opinion, it would be most dangerous so to hold. The Act requires every person who uses a motor vehicle, or causes or permits it to be used, on a road, to be insured against third-party risks. The obvious duty, therefore, of the owner is to see that he is insured and to make himself acquainted with the contents of his policy. He is not obliged to have a motor vehicle, but if he does he must see that he has such a policy as the law requires. If he does not understand his policy, he can seek guidance and instruction, but if he neither informs himself of its provisions nor gets advice as to what it covers, we are unable to see that he has any reasonable ground for believing that the policy covers something which it does not. Belief, however honest, cannot in our opinion be regarded as a special reason, unless it is based on reasonable grounds. It could hardly even be suggested that forgetfulness to renew a policy could be a special reason, and, indeed, this court said in *Whittall v. Kirby* (1) that it could not. Can, then, a man who has forgotten the renewal date of his policy and drives in the honest belief that his policy is still current, be in a worse position than one who, having a current policy, believes it covers him in a particular state of circumstances when it does not? It seems obvious that they are both in exactly the same position. It may be that if a man who felt he did not understand his policy took the advice of someone who was apparently in a position to explain it, such as an insurance agent, and received a wrong opinion, this might be considered a special reason, or again, if the question turned on some obscure phrase which might lead a person to believe he was

(1) Ante p. 194.

covered when a court ultimately decided that he was not. Those are questions which can be decided if and when they arise. We express no opinion on them. Here there is no finding or suggestion that the respondent took any advice or that the policy was one which a person in his position or degree of education could not understand, still less that it contained any obscurity or ambiguity. The plain fact is that having got the policy he never troubled to acquaint himself with its terms. We cannot hold that a belief founded on no reasonable ground can constitute a special reason.

The second ground given by the committee is, in our opinion, covered by the same considerations, and must also be rejected. In view of the findings we will assume that the committee thought that the respondent actually applied his mind to the question whether his friend had kept his policy in force and believed he had. But what possible ground had he for any such belief? That he knew his friend was looking for a new cycle may well be true, but that of itself could be no ground for believing that he still had an effective policy after he had parted with his cycle. Considering that he never even asked the question, we cannot possibly accept his belief on this matter as a special reason.

We desire to say a word with regard to the finding that there was no likelihood that the respondent would drive again without satisfying himself that he was insured and that therefore the safety of the public would not be prejudiced by allowing him to continue to drive. This matter has been emphasized in some of the Scottish decisions, which, no doubt, is why the committee refer to it. We do not understand them to give this as a special reason and in our opinion it could not be so regarded. In our opinion the Scottish cases do not, when rightly understood, mean to say that the fact that a man is not likely to offend again can of itself be a special reason. This is a matter which it is right to take into account in considering, where there are special reasons, whether the court will exercise the discretion which is then given to them. The court is not bound to refrain from disqualifying a driver, be the circumstances as special as can well be imagined: they may so refrain where there are special reasons, and in deciding whether they will or will not exercise their discretion they may take into account whether it is probable that the offender has learnt his lesson. We recognize in this case that the appeal committee, although we are obliged to differ from their conclusions, gave it

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the most thorough and careful consideration, and what we are about to add is not intended as the slightest reflection on them, but is for the guidance of magistrates and quarter sessions generally. It must be understood that disqualification is part of the punishment which Parliament has prescribed for certain motoring offences. Everyone will agree that certainly where a fine and not imprisonment is imposed, it is the most serious part of the punishment. That it often inflicts hardship, and in many cases grievous hardship, none will deny. But it is the punishment which Parliament has ordained, and moreover has enacted that *prima facie*, at least, it is to be imposed in all cases to which this penalty applies. There are in the statute-book laws which in terms allow the courts to take, or refrain from taking, steps on the ground of exceptional hardship, but there is no such provision in the Road Traffic Acts. This court has already laid down that financial hardship is not a matter which can be taken into account in this respect, and we desire to emphasize that this applies to any other form of hardship. It may often be distasteful to a court to impose a penalty, or to take a certain course which it may think is disproportionate to the offence, but it is not for them to question what the legislature has enacted. It is no doubt true that disqualification may work very hardly in a case where a man drives for his living, and have little effect in the case of another who can afford to employ someone to drive him while the disqualification is in force. Parliament has not seen fit to draw that distinction, and the decisions may now be said to be uniform throughout the United Kingdom that hardship is not a special reason for refraining from imposing this punishment. It is the duty of all courts to apply the law as enacted and as interpreted by the courts.

It follows that this appeal is allowed. We were asked by counsel to state, in the event of this court allowing the appeal, from what date the suspension of the licence was to run. The period of disqualification is, both in the case of s. 35 and s. 15, a period of twelve months from the date of the conviction. We observe that in s. 6, sub-s. 2, it is provided that a person who, by virtue of an order of a court, is disqualified for holding or obtaining a licence, may appeal against the order in the same manner as against a conviction, and the court may, if it thinks fit, pending the appeal, suspend the operation of the order. The justices were not, apparently, asked to suspend the operation of the order pending the appeal to quarter sessions,

and accordingly the respondent was disqualified from March 20 to May 27, when quarter sessions removed the disqualification. There is no provision in the Act as to what is to happen if the decision of quarter sessions is given subject to a case, though it would seem that if quarter sessions either themselves imposed a disqualification or dismissed an appeal from petty sessions which had imposed a disqualification, they could suspend the operation of the order until the decision of the High Court. Where, however, the court of quarter sessions either on a conviction does not suspend, or allows an appeal from a disqualification, or states a case, there is nothing in the Act to suggest that it is open to the High Court to order that disqualification should run from the date of the judgment of the High Court. All we can do is to restore the order of the petty sessions and it follows, therefore, that the disqualification is reimposed but will only be effective until March 20 of this year.

Appeal allowed.

Disqualification reimposed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for Sergeant & Collins, Scunthorpe.*

Solicitors for quarter sessions: *Taylor, Jelf & Co., for Eric W. Scorer, Lincoln.*

A. W. G.

CLARKE AND WIFE v. BRIMS.

1946
Nov. 29.

Motor car—Lights—Breach of statutory duty—Collision—Absence of rear light—Statutory duty to have rear light—Penalty for breach of statutory duty—Implied negligence—Whether breach gave a cause of action to person injured by breach—Road Transport Lighting Act, 1927 (17 & 18 Geo. 5, c. 37), ss. 1 and 10.

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Breach of the provisions of s. 1 of the Road Transport Lighting Act, 1927, which enacts that "every vehicle on any road shall "during the hours of darkness carry . . . one lamp showing "to the rear a red light" is a breach of a public duty the only remedy for which is provided by s. 10 of the Act, and does not render the party in default liable to an action at the suit of a person who alleges that he has suffered damage by reason of that breach, though *semble* it may be *prima facie* evidence of actionable negligence on the part of the party in default.

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ACTION tried before Morris J.

On October 14, 1944, at about 9.30 p.m., the first named plaintiff was driving his motor car along the Colnbrook by-pass when he ran into the back of the defendant's car, which was stationary by the side of the road, with the result that each of the plaintiffs and also the defendant suffered personal injury. At the moment of the impact the defendant was engaged in changing the near-side front wheel in consequence of tyre trouble.

The plaintiffs asserted that the defendant had no light of any kind at the rear of his stationary car, and maintained that this was the cause of the accident. They alleged that the defendant was negligent in failing to have a rear light; they also alleged that the defendant was in breach of his statutory obligation under the Road Traffic Transport Lighting Act, 1927 (1), in circumstances enabling and entitling them to found a cause of action against him. The defendant insisted that his car was properly lighted at the rear, and maintained that in any event the blame for the collision must lie with the first named plaintiff.

(1) The Road Transport Lighting Act, 1927, s. 1, sub-s. 1: "Subject to the provisions of this Act and of any regulations made thereunder by the Minister of Transport (in this Act referred to as 'the Minister'), every vehicle on any road shall during the hours of darkness carry—(a) two lamps, each showing to the front a white light visible from a reasonable distance; (b) one lamp showing to the rear a red light visible from a reasonable distance; and every such lamp shall, while the vehicle is on any road during such hours as aforesaid, be kept properly trimmed, lighted, and in efficient condition, and shall be attached to the vehicle in such position and manner as the Minister may by regulations prescribe. It shall be the duty of any person who causes or permits a vehicle to be on any road during the hours of darkness to provide the vehicle with lamps in accordance with

"the requirements of this Act and
"of any regulations made there-
"under."

Section 10: "If any person causes or permits any vehicle to be on any road in contravention of any of the provisions of this Act or of regulations made thereunder, or otherwise fails to comply with any such provisions, he shall be guilty of an offence and shall be liable on conviction by a court of summary jurisdiction for each such offence to a fine not exceeding 5*l.*, or in the case of a second or subsequent offence to a fine not exceeding £20; Provided that, if a person driving or being in charge of a vehicle is charged with such an offence, he shall not be convicted thereof if he proves to the satisfaction of the court that such offence arose through the negligence or default of some other person whose duty it was to provide the vehicle with a lamp or lamps."

The learned judge found as facts that the rear lights of the defendant's car were lit when the defendant stopped his car, but that during the time, which was not inconsiderable, which intervened between then and the moment of impact the rear lights for some reason failed, and that at the moment immediately before the impact they were not lit. He considered however, that the defendant believed that they were lit and was not unreasonably of that belief. It followed that the fact that the rear lights were not lit could not, in the circumstances, be imputed to the defendant as negligence, nor did the facts warrant any conclusion that the defendant was liable on the basis of causing a nuisance: see *Maitland v. Raisbeck & R. T. & J. Hewitt, Ltd.* (1). He further found that the first plaintiff was not guilty of negligence. The question therefore remained whether the defendant was liable in damages to the plaintiff by reason of breach of the statutory duty. The arguments on this point alone are reported.

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O'Malley and *Aubrey Fletcher* for the defendant. The Road Transport Lighting Act, 1927, which renders it obligatory for every vehicle on the road during the hours of darkness to carry a lamp showing a red light at the rear does not give a cause of action to anyone who has suffered damage through a breach of that provision, inasmuch as s. 10 provides that every person who causes or permits any vehicle to be on the road in contravention of the provisions of the Act shall be guilty of an offence, and shall be liable upon conviction before a court of summary jurisdiction to certain specified penalties. The mere proof that there was no light in the rear of the car at the time of the collision will not give a right of action to the plaintiffs unless it is also shown that the rear light was not lit through the defendant's negligence. It was held by the Court of Appeal in *Phillips v. Britannia Hygienic Laundry Co.* (2) that it was not intended by the Locomotives on Highways Act, 1896, and the Motor Cars (Use and Construction) Order, 1904, that every one injured through a breach of the order should have a right of action for damages; but that the duty imposed by the order was a public duty only to be enforced by the penalty imposed for a breach of it, and not otherwise. The principle applicable in the present case was stated by Lord Halsbury L.C. in *Pasmore v. Oswaldtwistle Urban Council* (3) as follows: "The principle that where

(1) [1944] K. B. 689.

(3) [1898] A. C. 387, 394.

(2) [1923] 2 K. B. 832.

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"a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately stated that principle in the case of *Doe v. Bridges* (1). He says: 'Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner'." Atkin L.J. said in *Phillips v. Britannia Hygienic Laundry Co.* (2): "One question to be considered is: Does the Act contain reference to a remedy for breach of it? Prima facie if it does, that is the only remedy." In *Badham v. Lambs, Ltd.* (3) du Parc L.J. applied the principle that where a specific remedy was given by statute for a breach of its provisions, no other remedy was available. In *Monk v. Warbey* (4) Maugham L.J. said that if the Act provides "a special remedy for a contravention of its provisions the prima facie rule is that that is the only remedy, and the question whether that rule applies in any particular case depends upon the purview of the legislation and the language employed."

Fox-Andrews K.C. and *Mitchison K.C.* for the plaintiffs. An argument based upon the breach of another statutory duty is not applicable with regard to a breach of this statutory duty. One must discover from the interpretation of the statute whether the remedy for breach of the duty imposed by the statute is limited to the fine expressly stated in the statute, or whether there is an action in tort available to one injured by the breach. Prima facie the person who has been injured by a breach of the statute can sue unless it can be established by considering the whole of the Act that no such right was intended to be given. The general object of the statute must be considered. What kind of mischief was it intended to prevent? If it is exactly the kind of harm which the plaintiff has suffered that is a strong argument in favour of his right to sue: see *Monk v. Warbey* (5). If on the other hand, the object of the statute was to prevent mischief of a particular kind one who suffers loss of a different kind from its non-observance cannot sue for his own recoupment. The plaintiff must show that the legislature intended that the duty should be owed to him

(1) (1831) 1 B. & Ad. 847, 859.

(4) [1935] 1 K. B. 75, 84.

(2) [1923] 2 K. B. 841.

(5) Ibid. 75.

(3) [1946] K. B. 45.

as well as to the State: if it was solely a public duty the plaintiff cannot recover for breach of it. The nature of the penalty must also be considered: see Winfield on Torts, 3rd ed., p. 153, seq. Farwell L.J. in *Dawson & Co. v. Bingley Urban Council* (1) said: "The breach of a statutory duty created for the benefit of an individual or a class is a tortious act, entitling anyone who suffers special damage therefrom to recover such damages against the tortfeasor." In *Phillips v. Britannia Hygienic Laundry Co.* (2) the court were not considering the construction of the regulation. Atkin L.J. (3) said: "I have felt some doubt upon it, because it is clear that these regulations are in part designed to promote the safety of the public using highways." That dictum has been approved by the Court of Appeal on other occasions. These regulations imposed not only a public duty but also a duty which could be enforced by a person who had been injured by its breach. Maugham L.J. pointed out in *Monk v. Warbey* (4) that a strong support to the view that the statute was not intended to preclude a civil action is the fact that it is brought by a person pointed out on a fair construction of the Act as being one whom the legislature desired to protect. The use of the word "negligence" in the proviso to s. 10 of the Road Transport Lighting Act, 1927, shows that Parliament was saying that a person who has a duty to provide a vehicle with a red light is guilty of negligence if he does not do so, and the failure of a person to keep his lights burning is negligence in that person, and the provision was designed to protect the rights of individuals. The fact that the rear light on the defendant's car was out at the time of the collision was a breach of statutory duty which raised a presumption of negligence and the onus of proof was shifted to the defendant who had not discharged that onus and the breach of statutory duty under the Act of 1927 gave the plaintiff a right of action for damages.

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1947. Jan. 17. MORRIS J., after reviewing the evidence and stating his conclusions, continued: Apart from the issue which I now have to consider, the consequence of the conclusions which I have stated would be that the claims of the

(1) [1911] 2 K. B. 149, 156.

(2) [1923] 1 K. B. 832.

(3) [1923] 2 K. B. 840.

(4) [1935] 1 K. B. 85.

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plaintiffs and the counterclaim of the defendant should fail. The plaintiffs put forward two submissions which become applicable if it is found that, at the material moment, the defendant had no rear light. They point to the provisions of the Road Transport Lighting Act, 1927, and claim that the defendant is liable in damages to the plaintiffs because, they say, he was guilty of a breach of statutory duty. They further submit that, if the defendant was in breach of a statutory duty, then a prima facie case of negligence is raised against him, and they submit that the burden of proof shifts so as to require the defendant to show that he was not negligent. They submit that the defendant should be regarded as having failed so to do. In regard to this last mentioned submission, it is doubtless correct to say that a breach of a statutory obligation may, in some circumstances, be relied on as forming evidence of negligence, but questions as to the onus of proof are not of equal consequence in cases where both sides have called evidence as in cases where evidence has only been forthcoming from one side. In the present case, both the plaintiffs and the defendant gave evidence, and I am of opinion, on the evidence in this case, that the absence of a rear light ought not to be regarded as amounting to negligence in the defendant. If it is necessary so to state the matter, I consider that the defendant has by his evidence displaced any prima facie case of negligence which the prior evidence in the action may have raised. This is apart from the question which I now pass to consider, whether the plaintiffs can recover damages if the defendant were in breach of a statutory obligation. [His Lordship read the relevant provisions of the Road Transport Lighting Act, 1927, and continued :]

Counsel appearing before me were not aware of any case in which a claim for damages based upon a breach of duty under this statute had been advanced. In *Phillips v. Britannia Hygienic Laundry Co.* (1), it was held that it was not intended by the Locomotives on Highways Act, 1896, that everyone injured through a breach of an order made under the Act should have a right of action for damages but that the duty imposed by the order was a public duty, only to be enforced by the penalty imposed for a breach of it and not otherwise. The particular clause in issue of the order in question provided for a motor car being in such a condition as not to cause or to be likely to cause danger to any person on the motor car or on

(1) [1923] 2 K. B. 832.

any highway. In his judgment (1) Bankes L.J., said: "The
 " only point of substance argued for the appellant was that the
 " Motor Cars (Use and Construction) Order, 1904, conferred
 " on him a statutory right of action for breach of its conditions.
 " Two well-known rules relate to this question; the first is
 " stated by Kennedy L.J. in *Dawson & Co. v. Bingley Urban*
 " *Council* (2) in these words: 'Now, the general law as to the
 " " remedy of a person who has been injured by the infringe-
 " " ment of a statutory right or the breach of a statutory
 " " obligation for his benefit is clear. Where the statute has
 " " not in express terms given a remedy, the remedy which by
 " " law is properly applicable to the right or the obligation
 " " follows as an incident. The law is, I think, correctly
 " " stated in Addison on Torts, 8th ed., p. 104, referring to
 " " Comyn's Digest: "In every case where a statute enacts or
 " " " prohibits a thing for the benefit of a person, he shall have
 " " " a remedy upon the same statute for the thing enacted for
 " " " his advantage, or for the recompense of a wrong done to
 " " " him contrary to the said law." Accordingly, where the
 " " statute is silent as to the remedy, the legislature is to be
 " " taken as intending the ordinary result; and the proper
 " " remedy for breach of the statute is an action for damages
 " " and, in a proper case, for an injunction'." That is the end
 of the lord justice's quotation from Kennedy L.J., and the
 lord justice continues: "In these cases it may be material
 " to consider whether the right conferred or the act prohibited
 " is for the benefit of a particular class of persons or of the public
 " generally. The second rule is thus stated by Lord Halsbury
 " in *Pasmore v. Oswaldtwistle Urban Council* (3): 'The
 " " principle that where a specific remedy is given by a statute,
 " " it thereby deprives the person who insists upon a remedy
 " " of any other form of remedy than that given by the statute,
 " " is one which is very familiar and which runs through the
 " " law. I think Lord Tenderden accurately states that
 " " principle in the case of *Doe v. Bridges* (4). He says:
 " " "Where an Act creates an obligation, and enforces the
 " " "performance in a specified manner, we take it to be a
 " " "general rule that performance cannot be enforced in any
 " " "other manner'." The observations of Bankes L.J. (5)
 are partly directed to a submission then made to the court that

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(1) [1923] 2 K. B. 837.

(4) 1 B. & Ad. 847, 859.

(2) [1911] 2 K. B. 149.

(5) [1923] 2 K. B. 839, 840.

(3) [1898] A. C. 387, 394.

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a mere breach of statutory duty would give rise to a claim even though the breach had in no way been responsible for the injury suffered. But, in dealing with this matter, the lord justice appears to be classing a provision in regard to exhibiting a rear light as one passed for the benefit of the public generally.

In his judgment in the same case, Atkin L.J. said this (1) :
 “ In my opinion, when an Act imposes a duty of commission
 “ or omission, the question whether a person aggrieved by a
 “ breach of the duty has a right of action depends on the
 “ intention of the Act. Was it intended to make the duty one
 “ which was owed to the party aggrieved as well as to the State,
 “ or was it a public duty only ? That depends on the construc-
 “ tion of the Act and the circumstances in which it was made,
 “ and to which it relates. One question to be considered is
 “ Does the Act contain reference to a remedy for breach of it ?
 “ Prima facie if it does that is the only remedy. But that is
 “ not conclusive. The intention as disclosed by its scope and
 “ wording must still be regarded, and it may still be that,
 “ though the statute creates the duty and provides a penalty,
 “ the duty is nevertheless owed to individuals. Instances of
 “ this are *Groves v. Lord Wimborne* (2) and *Britannic Merthyr*
 “ *Coal Co. v. David* (3).”

There is this further passage in the judgment of Atkin L.J., which is very material in regard to the general principle (4)
 “ Therefore the question is whether these regulations, viewed
 “ in the circumstances in which they were made and to which
 “ they relate, were intended to impose a duty which is a public
 “ duty only or whether they were intended, in addition to the
 “ public duty, to impose a duty enforceable by an individual
 “ aggrieved. I have come to the conclusion that the duty they
 “ were intended to impose was not a duty enforceable by
 “ individuals injured, but a public duty only, the sole remedy
 “ for which is the remedy provided by way of a fine. They
 “ impose obligations of various kinds, some are concerned more
 “ with the maintenance of the highway than with the safety
 “ of passengers ; and they are of varying degrees of importance ;
 “ yet for breach of any regulation a fine not exceeding 10*l.* is
 “ the penalty. It is not likely that the legislature, in
 “ empowering a department to make regulations for the use
 “ and construction of motor cars, permitted the department to
 “ impose new duties in favour of individuals and new causes
 “ of action for breach of them in addition to the obligations

(1) [1923] 2 K. B. 840.

(3) [1910] A. C. 74.

(2) [1898] 2 Q. B. 402.

(4) [1923] 2 K. B. 842.

" already well provided for and regulated by the common law
 " of those who bring vehicles upon highways. In particular
 " it is not likely that the legislature intended by these means to
 " impose on the owners of vehicles an absolute obligation to
 " have them roadworthy in all events even in the absence of
 " negligence."

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The test is, therefore, whether the intention of the Act was to make the duty a public duty only, or whether the intention was to make the duty one owed as well to the party aggrieved. As this is so largely a question of construction and of the circumstances concerning the making of the Act and of the circumstances to which it relates, it follows that authorities concerning different Acts can only assist in so far as guidance on principle is given. In *Monk v. Warbey* (1), it was held that the object and purview of the Road Traffic Act, 1930, showed that the penalties prescribed by s. 35 were not intended to be the sole remedy where an owner of a car, in breach of statutory duty, permitted his car to be used by a person who was not insured against third-party risks. The principles laid down by this and other cases are conveniently summarized by Professor Winfield at pp. 170 to 175 of his *Law of Torts*, 2nd ed. In a case decided in 1945, *Badham v. Lambs, Ltd.* (2) the headnote is as follows: " By s. 8, sub-s. 1, of the Road Traffic Act, 1934, it is unlawful to sell a motor vehicle for delivery in such condition that its use on a road in that condition would be unlawful, and a penalty is imposed for breach of the sub-section. The defendants sold a car to the plaintiff which was in such condition, by reason of having defective brakes. The plaintiff brought an action for damages, based on the above breach of statutory duty:— Held, that the main object of the legislature was the punishment of offenders and there was nothing in the Act of 1934 to show that it was the intention of Parliament to protect the purchaser and to give him a right of action." *du Parcq L.J.*, as he then was, there held that no right of action was given to a purchaser who became involved in an accident brought about by a defect in the braking system of the car which he bought.

The conclusion at which I have arrived is that this Act imposed duties which were public duties only and did not in addition impose duties enforceable by any individuals aggrieved. The duties seem to be similar to and comparable with those

(1) [1935] 1 K. B. 75.

(2) [1946] K. B. 45.

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which were under consideration in *Phillips v. Britannia Hygienic Laundry Co.* (1), and in *Badham v. Lambs, Ltd.* (2). Furthermore, this Act contains reference to a remedy for certain breaches of it. I have referred already to s. 10 of the Act. Submissions were made to me in regard to the construction of that section. The question presents itself on the facts as I have found them: Could it really be said that the defendant had caused or permitted his vehicle to be on the road in contravention of the provisions of the Act? In this connexion, the observations of Lawrence J., as he then was, in *Goldsmith v. Deakin* (3), and of Lord Wright in his speech in the House of Lords in *McLeod v. Buchanan* (4), are very material. I do not, however, think it necessary that I should decide this matter. The question is not whether this defendant would be liable under the penalty section of the Act of 1927, but, on the assumption that he was in breach of an obligation laid down by that Act, whether he becomes liable to be sued at the instance of any persons aggrieved or consequentially injured. Applying the tests which have been laid down, my view is that the Act imposes public duties only.

For the reasons which I have given, it therefore follows that the claims of the plaintiffs and the counterclaim of the defendant fail.

Claim and counterclaim dismissed.
No order as to costs.

Solicitors for plaintiffs: *A. F. & R. W. Tweedie.*
 Solicitors for defendant: *William Easton & Sons.*

- (1) [1923] 2 K. B. 832. (4) [1940] 2 All E.R. 179, 187,
 (2) [1946] K. B. 45. 188.
 (3) (1933) 30 Cox C. C. 32.

R. F. S.

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 Dec. 12.
 ———
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FOOT CLINICS (1943), LIMITED *v.* COOPER'S GOWNS, LIMITED.

Landlord and tenant—Lease for duration of hostilities—Termination of lease—Letter by landlords to tenants suggesting that they might carry on until full time of lease expired—Subsequent notice by landlords terminating tenancy—Landlords' letter not a promise intended to be acted upon—Validation of War-Time Leases Act, 194 (7 & 8 Geo. 6, c. 34), s. 1.

A lease made on February 12, 1941, was expressed to be for

a term expiring "when all physical hostilities on the part of the armed forces of the belligerent parties in connexion with the war shall have ceased for a continuous period of six months, subject to the term not exceeding December 15, 1947." By virtue of the Validation of War-Time Leases Act, 1944, the lease was determinable by one month's notice in writing given after November 9, 1945. On January 1, 1946, the plaintiffs (landlords) wrote to the tenants saying (inter alia): "We would therefore suggest that so far as we can see at present there is no reason why you should not carry on until the expiration of your lease on December 15, 1947, when our own lease expires." On August 19, 1946, the landlords wrote giving the tenants one month's notice to quit. Subsequently the landlords commenced proceedings in the High Court to recover possession of the premises. The tenants contended that they had been misled by the landlords' letter of January 1, 1946, and that it would be inequitable in those circumstances to give the landlords possession:—

Held, that the landlords' letter of January 1, 1946, was not a promise to allow the tenants to remain in occupation of the premises until December 15, 1947, which was intended to create legal relations and that, therefore, the letter was no bar to the landlords exercising their rights to possession.

Central London Property Trust, Ltd. v. Hightrees House, Ltd. ante p. 130, distinguished.

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ACTION tried before Denning J.

By a lease made on February 12, 1941, some workshop and office premises in Upper Street, Islington, which premises were not within the Rent Restriction Acts, were let to the defendants, Cooper's Gowns, Ltd., at a rent of 150*l.* a year, for a term from February 12, 1941, expiring "when all physical hostilities on the part of the armed forces of the belligerent parties in connexion with the war shall have ceased for a continuous period of six months, subject to the term not exceeding December 15, 1947." At the time when the lease was made, Japan had not entered the war. The present plaintiffs, Foot Clinics (1943), Ltd. were the assignees of the original lessees. By virtue of the Validation of War-Time Leases Act, 1944 (1), the lease was determinable by one month's notice in writing given after November 9, 1945.

(1) The Validation of War-Time Leases Act, 1944, s. 1: "The grant of a tenancy for the duration of the war shall have effect as if it granted or provided for the grant of a tenancy for a term of ten years subject to a right exercisable either by the

"landlord or the tenant to determine the tenancy, if the war ends before the expiration of that term, by at least one month's notice in writing given after the end of the war." Sec. 2 "where any tenancy agreement uses, for the purpose of defining

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The plaintiffs wrote a letter to the defendants, dated January 1, 1946, in which they said: "With reference to your lease of the premises you occupy at the above address"—that is Upper Street—"I understand the legal position of any lease made out for the duration of hostilities is that it automatically becomes subject to one month's notice on either side We would, therefore, suggest that so far as we can see at present there is no reason why you should not carry on until the expiration of your lease on December 15, 1947, when our own lease expires." The defendants wrote to the plaintiffs on May 13, 1946: "On January 1 last you were good enough to write to us explaining the position of our lease of the above premises and that we should be able to carry on until the full term expired on December 15, 1947, that is when your own lease expires" and they go on to make inquiries about plans. On May 15, 1946, two days later, the plaintiffs replied and said: "I am afraid it is quite impossible for us at the present moment to make any definite statement as to our intentions in connexion with the above premises, as we have not yet been able to decide what our future plans will be." On August 19, 1946, the plaintiffs wrote a letter in which they said: "We find that owing to a change in our plans we shall be requiring the remainder of our premises at Upper Street and under the circumstances, therefore, we enclose formal notice which we trust will not put you to too great inconvenience." The plaintiffs gave the defendants one month's notice to quit. As the defendants did not comply with the notice, the plaintiffs brought the present proceedings by which they claimed possession of the demised premises and mesne profits.

Fearnley-Whittingstall for the plaintiffs. The letter of January 1, 1946, did not contain a binding promise by the

"the term or purported term of the tenancy . . . the expression 'the war' or 'hostilities' . . . the expression shall be construed as referring to the war or hostilities as respects those States with which His Majesty was at war at the date when the agreement was made . . ."

The Tenancy Agreements (End of the War in Europe) Order,

1945 (St. R. & O. 1945, No. 703/L. 8) "For the purpose of the construction of any tenancy agreement, May 9, 1945, shall . . . be treated as the date of the end of the war and of hostilities as respects each and all of the States in Europe, with which His Majesty has been at war since September 3, 1939."

plaintiffs that the defendants could remain until December 15, 1947. It was a mere suggestion so far as the plaintiffs could see at present. The decision in *Central London Property Trust, Ltd. v. Hightrees House, Ltd.* (1) is not applicable in the present case, because in that case there was a promise which was intended to be binding, and was intended to be acted upon and was acted upon.

H. V. Lloyd-Jones for the defendants. The defendants were lulled by the letter of January 1, 1946, into a sense of security that they would be allowed to stay on in the demised premises until December 15, 1947. Lord Cairns L.C. said in *Hughes v. Metropolitan Ry.* (2): "James L.J. in the observations which he made is reported to have said this: 'I am of opinion from all this correspondence that the lessor' (that is the present appellant) 'lulled the defendants to sleep, 'intentionally lulled them to sleep, until it was too late for them to do the repairs, that he intentionally induced them to wait till the six months were nearly over and then sought to enforce the forfeiture.' That not merely states a case which would entitle the Court of Equity to give relief, but states a case as against the appellant which imputes to him a serious offence in point of morals." And later he said: "If parties, who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeitures—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties." The last quotation was cited with approval by Bowen L.J. in *Birmingham & District Land Co. v. London & North Western Ry. Co.* (3). [*Fenner v. Blake* (4) and *Buttery v. Pickard* (5) were also cited.] The plaintiffs by their silence were inducing the defendants to suppose that they could stay on in the demised premises.

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DENNING J., after stating the facts, continued: Reading the

(1) Ante p. 130.

(4) [1900] 1 Q. B. 426.

(2) (1877) 2 App. Cas. 439, 443.

(5) [1946] W. N. 25.

(3) (1888) 40 Ch. D. 268, 286.

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lease together with the provisions of the Validation of War-Time Leases Act, 1944, it is clear that it is to have effect as if it granted a tenancy for a term expiring on December 15, 1947, subject to a right exercisable either by the landlord or the tenant to determine the tenancy by at least one month's notice in writing given after November 9, 1945. I need not trace out the particular steps by which that conclusion is reached. It seems to me plain on the Act that that is the result. The tenancy was determinable, therefore, by at least one month's notice in writing given after November 9, 1945.

It is quite plain, in point of law, that the lease was determined by the notice to quit given on August 19, 1946, on the expiration of the month. The question which has arisen is whether the plaintiffs are disentitled to act on their legal rights by reason of the correspondence which I have read. A recent decision which I gave in *Central London Property Trust, Ltd. v. Hightrees House, Ltd.* (1) was referred to : but this case does not fall within that decision. The essential point of that decision was that there was a promise which was intended to create a legal relationship, intended to be legally binding. On the construction of the letter of January 1, 1946, I am satisfied that this was not a promise at all. It was certainly not a promise which was intended to create legal relations. It reads : " We would therefore suggest that so far as we can " see at present there is no reason why you should not carry " on." Those words are incapable of being brought within the decision to which I have referred.

Reference was made by counsel for the defendants to some cases in equity, particularly *Hughes v. Metropolitan Ry.* (2) and *Birmingham District Land Co. v. London & North Western Ry.* (3). In my view, those cases illustrate the principle which I endeavoured to apply in *Central London Property Trust v. Hightrees House* (1), with this difference, that the promises in the *Hughes* (2) and *Birmingham* (3) cases were not express but were to be inferred from the circumstances of those cases, whereas in the other cases to which I referred the promises were express. The cases of waiver at common law, such as *Panoutsos v. Raymond Hadley* (4) and *Hartley v. Hymans* (5) illustrate the same principle, but there again the promises were not express but to be inferred. In the present case the

(1) Ante p. 130.

(2) 2 App. Cas. 439, 443.

(3) 40 Ch. D. 268, 286.

(4) [1917] 2 K. B. 473.

(5) [1920] 3 K. B. 475.

letter contained no express promise and no promise can be inferred, certainly no promise which was intended to be binding. I therefore hold that this letter is no bar to the plaintiffs exercising their rights to possession.

A third point was raised as to the Courts Emergency Powers Act, 1943, but it is plain that, this lease having come to an end and been determined quite properly by notice, that Act does not present any bar to the judgment for possession.

The result of the case is that there will be judgment for the plaintiffs for possession and for mesne profits. Possession to be given within fourteen days.

Judgment for plaintiffs.

Solicitors for plaintiffs : *Blyth, Dutton & Co.*

Solicitors for defendants : *Crane & Hawkins.*

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Mar. 3, 4.

Revenue—Stamp duty—Receipt for money—Entry on electricity prepayment meter card—Receipt not "given" to consumer—Stamp Act, 1891 (54 & 55 Vict., c. 39), ss. 101 and 103, sch. I.

Lord Greene
M.R.,
Morton and
Somervell L.JJ.

An entry made by a collector on an electricity prepayment meter card of the amount collected by him does not, when the card remains the property of the company supplying the electricity, constitute the "giving" of a receipt by the company so as to make the entry liable to stamp duty under the Stamp Act, 1891.

Decision of Macnaghten J. (ante p. 27), affirmed.

Quære whether the entry on the card would in any case constitute a receipt.

APPEAL from Macnaghten J. (1) on a special case stated under R. S. C. Or. 68, r. 2 and Or. 34, r. 1.

In a suit commenced by subpœna, dated October 24, 1945, a claim was made by the Crown against the Northwood Electric Light & Power Company, Ltd., for payment of a fine of 10*l.* under the statutes relating to the revenue of stamps, it being

(1) Ante p. 27.

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alleged that the company had given a receipt liable to stamp duty which was not duly stamped.

The company carried on the business of supplying electricity, being the authorized undertakers for an area, which includes premises occupied by a Mr. Oliver at Eastgate, Middlesex. Mr. Oliver took a supply of electricity from the company and his consumption was measured by means of a prepayment meter. As in the case of other consumers using such meters, there was on the premises occupied by Mr. Oliver a meter card used from November 28, 1938, to March 8, 1943, and another card covering the period for March 8, 1943, to June 6, 1945. The card was normally kept hung on or near the meter. It was the practice for collectors employed by the company to call from time to time to inspect the meters, and to deal with the money deposited therein, on such occasions the collector made entries on an electricity prepayment collection card and simultaneously by means of carbon copying on the prepayment meter card and on a blue card which was taken back by the collector to the company's office for filing, but was brought back for further entries on the next visit by a collector. The prepayment meter card was the property of the company. Apart from the above duties the collector had no authority to give receipts on behalf of the company.

Before signing an application for the supply to him of electricity Mr. Oliver had been handed a copy of the company's Handbook and Conditions of Supply, cond. II of which read as follows :—

“ II. (1.) Every consumer taking a supply through a pre-
“ payment meter shall pay to the Company on demand any
“ difference between the amount payable under the scale of
“ charges under which he shall for the time being be chargeable
“ for the number of units supplied to him and the amount of the
“ coins in the box attached to the meter however such difference
“ shall have arisen including (without prejudice to the gener-
“ ality of the foregoing) theft or loss of any coins placed in the
“ box or any defect in the mechanism of the meter or otherwise.
“ (2.) Coins on being placed in the box attached to the meter
“ shall become the property of the company but the consumer
“ shall be responsible for the safe custody thereof until collected
“ by the company. (3.) If any disc or any coin not being legal
“ tender shall at any time be found in the box attached to the
“ meter the company shall be entitled forthwith to disconnect
“ the premises and cut off the supply.”

The card of Mr. Oliver's premises showed that on March 8, 1944, a sum of 3*l.* 1*s.* was taken from the meter, a rebate of 10*s.* 1*d.* was allowed to the consumer (in respect of payments made in excess of the charges payable under the scale of charges) a sum of 3*s.* was left in the meter and the balance of 2*l.* 7*s.* 11*d.* was taken away by the collector. The last-mentioned sum was entered on the card in a column headed "Amount due and collected."

It was contended on behalf of the Attorney-General that the entry on the prepayment meter card constituted a "receipt" given for or upon the payment of money amounting to 2*l.* "or upwards" under sch. I. to the Stamp Act, 1891 (1), and accordingly was liable to a twopenny stamp.

It was contended for the company (1.) that the consumer using a prepayment meter paid for his electricity in advance and never owed any money to the company except when there was a "difference"; (2.) that the entry in question recorded only the removal by the company of money which had belonged to it and not any payment of a debt due to it; (3.) that such entry was not a "receipt" within the meaning of the material provisions of the Stamp Act, 1891; and (4.) that the entry was not "given" within the meaning of those provisions.

Macnaghten J. held that as the electricity prepayment meter card remained the property of the company the entry made by the collector on the card did not constitute the "giving" of a receipt so as to render the entry liable to stamp duty.

The Attorney-General appealed.

Sir Frank Soskice S.-G. and *J. H. Stamp* for the Crown. The entry on the card of the amount collected and taken away is a receipt within s. 101 of the Stamp Act, 1891. It is an acknowledgment by the collector on behalf of the company of the payment to it of that amount and ought to have a twopenny

(1) Stamp Act, 1891, s. 101, sub-s. 1: "For the purposes of this Act, the expression 'receipt' includes any note, memorandum or writing whereby any money amounting to two pounds or upwards . . . is acknowledged or expressed to have been received or deposited or paid"

Section 103: "If any person—(1.) Gives a receipt liable to

"duty and not duly stamped; or (2.) In any case where a receipt would be liable to duty refuses to give a receipt duly stamped; . . . he shall incur a fine of ten pounds"

Schedule I., which sets out a list of documents liable to stamp duty includes: "RECEIPT given for, or upon the payment of, money amounting to two pounds or upwards."

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stamp. The company is therefore liable for the penalty of 10*l.* under s. 103 and sch. I. Macnaghten J.'s view that although the entry on the card was a receipt it had not been "given" to the consumer because the card remained the property of the company would make it the easiest thing to avoid stamping a receipt. There are no authorities directly in point but there are three cases worthy of consideration. The first is *A.-G. v. Carlton Bank* (1) where it is said that for a document to be a receipt it must be handed over to a person as an acquittance. That is so in this case with the entry in the card. The second case is *Day v. Glaister* (2), and the third is *General Council of the Bar (England) v. Inland Revenue Commissioners* (3) which relates to the stamp on counsel's brief where he is paid his fee with the brief. In the Concise Oxford Dictionary the word "give" is defined as (1.) "bestow gratuitously" and (2.) "Deliver, hand over, without reference to ownership." It is reasonable to treat "gives" as having a second meaning in s. 103 and the words in para. 1 "gives a receipt" as meaning "delivers for use as a voucher." On that view the company is liable for giving a receipt unstamped. So too, in para. 2 "give" has the same meaning.

[Morton L.J. Deliver for use for how long?] There is no specified time. It must vary with the particular object for which the receipt is required; and, in any case, the person giving a receipt can impose a condition provided the recipient does not object. If he objected he could ask for an absolute receipt and a refusal to give such a receipt duly stamped would be an offence under para. 2 of s. 103. Here the card still remains available to the consumer as long as he resides on the premises and that limitation has not been objected to by him.

Sir Roland Burrows K.C. and *Fletcher-Cooke* for the company. It is important to look to the use for which a document is supplied in order to see whether it is a receipt: *Midland Bank, Ltd. v. Inland Revenue Commissioners* (4). Here the entry on the prepayment meter card is not a receipt. Payment is made in advance and the use of the card is to show how the sum found in the box has been dealt with and how much the collector has taken away. The card protects the consumer from an unscrupulous collector. Condition 11 of the Handbook and Conditions of Supply makes it clear that except when the sum taken from the box is less than the amount payable under the

(1) [1899] 2 Q. B. 158.

(3) [1907] 1 K. B. 462.

(2) (1900) 37 S. L. R. 736.

(4) [1927] 2 K. B. 466.

scale of charges, nothing is being paid to the company when the collector empties the box. The entries on the card are part of the company's method of bookkeeping. In s. 103, paras. 1 and 2 the words "give a receipt" have the same meaning. What amounts to giving a receipt is made clear by Lord Russell of Killowen C.J. in *A.-G. v. Carlton Bank* (1). The card remains the property of the company and even if the entry in it could be said to be a receipt it is not given.

Sir Frank Soskice S.-G. replied.

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LORD GREENE M.R. The document which is said by the Crown to contain a receipt within the meaning of s. 101 of the Stamp Act, 1891, and is said to have been given by the Northwood Electric Light & Power Company to the consumer, is a document containing a number of recorded particulars. The body of it is fourteen columns, and in those various columns there are a number of figures and records which are important from the point of view of the regulation and control of the consumption by the consumer. There are also several other particulars apart from those fourteen columns, but the Crown picks on one of those columns, "Amount due and collected," and claims that the entries in that column are receipts, and that, in the circumstances in which the consumer has this card in his possession, they are receipts given to him within the meaning of the schedule to the Stamp Act, 1891, and s. 103 of the Act which imposes the relevant penalty. The document, when looked at and taken as a whole, appears to me to be quite clearly a document framed and filled in for purposes other than those of acknowledging the receipt of money. But that does not necessarily result in the document not being or containing a receipt. Taking the document as a whole and remembering that the entries upon it are reproduced on two other documents which are no concern of the consumer and are kept for the purposes of the company's records, the general object of the document appears to me to be what I may call an administrative one. The card itself and the other two documents are filled up for the purposes of internal checking by the company of its returns of the current consumed by the consumer and the money collected from the slot at the meter. It also has another very useful function from the point of view of the consumer. I can find no contractual right on the part of the company to leave the card on the consumer's premises; nor

(1) [1899] 2 Q. B. 158, 165.

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can I find any contractual right on the part of the consumer to require that the company should leave it on his premises. No sensible consumer would object to the company leaving it there, and no sensible company would, I imagine, arbitrarily take it away. It is mutually convenient to the company and the consumer that the consumer should have this record because by looking at it, he can see what current he has consumed, what amount he has put in the box, what has been collected from him and what rebates he has been allowed. He can thus check his whole position generally. I say that I can find no contractual right in the consumer to keep this document or to insist that the company should leave it in his possession for this reason. There is no reference to any such card in the conditions on which the consumer takes his supply which are to be found in the "Consumer's Handbook." It is a convenient system to the advantage of both parties and no sensible person would object to it.

It is suggested that the endorsement on the envelope in which the card is supposed to be kept on the consumer's premises records some kind of contract between the company and the consumer with regard to the retention of this card and gives to the consumer some sort of right as against the company to insist on keeping the card. The envelope, the terms of which we are to assume the consumer in question here was acquainted with, states on its face: "This envelope and card are the property of the Northwood Electric Light & Power Company Limited." There is then a request to the consumer: "Please keep them clean and where they can soon be found." Then comes this, which is particularly relied upon: "The entries on the card enable the consumer to check the quantity charged for and record the amount of money collected from the meter." The word "record" follows the words "The entries on the card." That is a statement of the convenient purposes which this card will serve from the consumer's point of view. If he ever wants to find out what quantity of electric energy he has consumed, and what has been charged for it, he can look at the card. All he has to do is to go to the meter, look at the card, and he will find out. If he wants to know how much money has been taken for the current that he has consumed, he can go and look at it at any time convenient to himself. The words do not suggest—though this is by no means conclusive—that one function of the document is to act as a receipt given by the company to the consumer. It is suggested that

there is to be inferred or spelt from the language some sort of contract under which the consumer is entitled to say to the company: "This document is my voucher and I am entitled "as between you and me to keep it as a voucher." It is not suggested that he can claim to keep it for ever, because again, it is common ground that, when a tenancy changes and one consumer goes away and is replaced by another, the old consumer does not take his card away. It runs, so to speak, with the house. The consumer has, so it is said, a limited property in the card in this sense, that he is entitled to insist on keeping it so long, and so long only, as he is there. I do not myself put his rights as high as that. I can discover no right in him to hold this document for five minutes if the company chose to take it away from him. Indeed, to say that he is entitled to hold it for longer is in a sense really begging the question, or one of the questions, which we have to decide. If the right of the consumer to keep this card against the will of the company is non-existent, or at most existent for a limited period, namely, until the card is completely filled up, or until the consumer leaves the premises and gives up taking the supply, then this card fails to give to the consumer what a receipt in the ordinary acceptation of that word gives. It is true it might enable him, if he found himself in dispute with the collector to refer the collector to the card. But it certainly cannot operate in the way that a receipt ordinarily operates. One of the objects of a receipt, as indeed the Act contemplates, is that it can be produced as evidence in a court of law. If it is not stamped, it cannot be so produced. The Act, therefore, is recognizing the use of such a document in a court of law as being one of the things which one would expect the holder of a receipt to enjoy normally. Unquestionably, if you say a person has given you a receipt for something, what you mean is he has given you something which you can keep as your own and produce on all occasions that it is required, particularly in a court of law.

It is said that this document is a receipt within s. 101, sub-s. 1. The words particularly relied upon are these: "For the purposes of this Act, the expression 'receipt' includes any note, memorandum or writing whereby any money amounting to "two pounds or upwards . . . is acknowledged or expressed "to have been received or deposited or paid." It is common ground that, before duty is attracted to a document which fulfils that description, the document must be "given."

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That is to be found in the schedule which imposes a duty of what is now *2d.* on a "receipt given for, or upon the payment of, " money amounting to two pounds or upwards." Therefore, it is the "giving" of a document which satisfies that description that attracts duty. Under s. 103, para. 1, which is sued upon in this case, a person only becomes liable to a fine if he "gives a receipt liable to duty and not duly stamped." That is what it is said the company gave here by this document. I do not find it necessary to go into the question whether this document is, in itself, a receipt within the meaning of s. 101, sub-s. 1. I may, however, call attention to the fact that, in order to be a receipt, it must be a document whereby the receipt or deposit or payment of money is acknowledged or expressed. As was pointed out by Lord Russell of Killowen C.J., in *A.-G. v. Carlton Bank* (1), the words "acknowledged" or "expressed" do appear to mean "acknowledged or "expressed to somebody"—one would think acknowledged or expressed to the person paying or depositing money. That means that the document must, so to speak, have a bilateral operation. A mere entry in a man's own book in which he notes up against a debt owing to him that it has been paid is not an acknowledgment or expression to anybody, but a mere note made for his own convenience. On the other hand, to take the example put by my brother Morton in the course of the argument, if he tears out the sheet from his book and gives it to the payer, the document which started by being a unilateral document may, by that very act, acquire the quality of an acknowledgment or expression. This case might be considered from the point of view of whether the action of the company in relation to its card as between itself and the customer imports that bilateral quality of acknowledgment or expression, having regard to the absence of any right on the part of the consumer to keep it. But I need not go into that rather subtle aspect of the case because in order to attract duty the document must be "given." It is not, I think, to be disputed that, when that word is considered in this context, in relation to a document of the character of a receipt, the qualities and advantages of which are well known, one of them being, as the statute itself contemplates, its production in a court of law, nobody can be said *prima facie* to have "given" a receipt if he attaches a condition limiting in some way the right of the recipient to keep it. It was suggested that cases might be thought of under which a

(1) [1899] 2 Q. B. 158.

document so limited or circumscribed might, nevertheless, amount to a receipt. I am not concerned to dispute that. In fact, one example is quite common—a deposit receipt which will frequently, if not generally, bear on its face some such statement as that “the money deposited will be handed back “against the surrender of this receipt.” That is a case where the right of the person to whom the receipt is handed is circumscribed in the sense that in certain conditions he has to hand it back. But, of course, a deposit is rather a special type of transaction, quite unlike the ordinary payment of a debt, because, when once the money deposited has been paid back, the usefulness of the receipt comes to an end for all practical purposes. On the other hand, in the case of a debt that is not true, because a debt may be claimed again.

Examples were put of cases where receipts might be given on the terms that they should be handed back within a limited period, or even after quite a short period, to the giver. It was said if a man's tailor handed to him a document, on the face of it a receipt, with a condition imposed that the customer should hand it back to the tailor after six months, he would, nevertheless, be said to have given a receipt, provided—and this is important—that the customer had in some way conducted himself so as to effect what amounted in law to a waiver of his right to demand an unconditional receipt. Absurd cases like that can be thought of, but it might very well be that a tailor who endeavoured to impose such conditions on his customers might find a very powerful reaction on their part. But I am not disposed to dispute the proposition, for the purposes of this argument, that, if a payer quite clearly waives any right to an unconditional receipt, and accepts the document on the terms that it shall not be his but that he shall hand it back after a limited period, such a thing can be a receipt “given.” What I am concerned to point out is that this is not the natural meaning of the word, and that, if such a case would still fall within the meaning of the word “gives” in the Act, it could only so fall if the *prima facie* meaning of the word was quite clearly excluded on the facts. It seems to me that, in order to deprive the payer of his right to an unconditional unlimited receipt, there would have to be some perfectly clear acceptance on his part of the condition which it is sought to impress upon the giving of the document. What is the position here? The document can be taken away by the company at any moment or if the construction put forward by the Crown is

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right, when the customer leaves the house. The document for mutual convenience is used and put upon the consumer's premises. He is not given the opportunity of insisting upon a receipt. If the argument is true that he has waived his right to a receipt, the waiver must have resulted from the fact that he has had imposed upon him a document which is put into his custody for a quite temporary purpose. How that can amount to a waiver I am unable to understand. Moreover the argument, with all respect to the Solicitor-General, will not work for another reason. When one looks at s. 103 one finds these two paragraphs. First, there is the one under which the present claim is brought: "If any person (1.) gives a receipt liable to "duty and not duly stamped." It is said that the company gave to the customer here a receipt liable to duty, and the word "gives" for that purpose is construed as covering the leaving of this document on the premises of the customer in the circumstances which I have stated. It is said to be given to the customer although he has no right to keep it as against the company, and that a waiver has been made of what might be called his *prima facie* plenary right to an unconditional receipt. According to the Crown, the sub-section has been satisfied and a receipt has been given. Then we come to para. 2: "If any "person . . . (2.) in any case where a receipt would be liable "to duty refuses to give a receipt duly stamped." It is conceded that that paragraph comes into operation when the customer demands what I call a plenary unconditional receipt, and that in this case the customer could say to the company "Please give me a receipt which I can keep"—that is, a receipt which is to be the property of the customer. It is admitted the company could not in response to that request impose a condition that the customer's right to keep the document should in any way be limited. Accordingly, if the Crown is right, this curious position would arise. First of all, a stamp has to be impressed upon this card whenever the collector makes the relevant entry in respect of a sum of more than 2*l*. The customer next day can say to the company: "Give me an "unqualified receipt," and the company would be bound to give him such an unqualified receipt under a penalty of 10*l*. if it refused. This involves, be it observed, giving a different meaning to the word "give" in para. 2 to what it has in para. 1, because in para. 2 admittedly it must mean give out and out, give without any condition or limitation as to the recipient's right to keep it while, if the Crown is right, the

words "gives a receipt" in para. 1 are satisfied by something much less, namely, the giving of a receipt in respect of which the customer's right to keep it is momentary only or for a limited time only. I cannot myself in relation to one transaction, and one sum of money, construe the phrase "gives a receipt" in one sense in para. 1, and in a different sense in para. 2. It appears to me that in this case there are no circumstances from which it can be inferred that the customer has any choice in the matter at all so far as keeping this card is concerned, though I suppose he could say to the company "Take it away—I do not want it." But he has no right to demand to keep it as long as he likes. I can find nothing in the circumstances of this case which, in the remotest degree, could be construed as a waiver by the customer of his right to demand a full receipt, or as in any way an acceptance binding upon him of something less than a full receipt. That being so, it seems to me that the phrase "gives a receipt" must bear its ordinary prima facie meaning, and that the receipt must be given in such a way that it will be available to the recipient whenever he may want it for the purpose it purports to effect.

There is just one other matter which I should mention to show that I have not forgotten it, because it does I think strengthen this decision. That is the language of sub-s. 2 of s. 101 which says this: "The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands." Can it be said in this case that the company has delivered this card out of its hands when it retains the property in the card and can take it back at any moment or, at any rate, at the moment when the customer leaves the house? It seems to me, giving the language its ordinary meaning, that that cannot be said.

I have not referred to any authority except that of the *Carlton Bank* case (1), and I do not think I need burden this judgment with much reference to any other authority. But perhaps it is worth observing this. In all the cases where this section has come under construction—and there are only a few—it seems to have been assumed in the language of the judges who have dealt with it, that a person to whom a receipt is "given" is meant to retain it. That phrase "retain it," and another phrase "to be kept as evidence of payment by the recipient" appear in the judgment of the Lord Chief Justice

(1) [1899] 2 Q. B. 158.

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in the *Carlton Bank* case (1), but I think it is even more clearly expressed that that is the fundamental conception in the judgments of the Court of Session in *Day v. Glaister* (2) a Scottish case. There, dealing, of course, with a different class of case Lord Trayner describes the operation of the statute in this language (3): "It appears to me that what the "statute provides for is limited to any note, memorandum or "writing given by one person to another, to be retained by the "recipient as his voucher, either of the discharge of a payment "made, as in the ordinary case of payment of a debt, or "acknowledgment of an obligation undertaken in respect of the "receipt of money, as in a deposit. Sections 102 and 103 of the "Act appear to me plainly to refer to receipts, which, have "passed from one person to another, and these are, in my "opinion, the kind of notes or memoranda to which s. 101 "alone refers." I need not quote more from those judgments. Although the point that we have to decide was not, of course, before the judges in those cases, it is significant that the language that they use makes it quite clear that, in their opinion, they are dealing with something which any ordinary person, understanding the language of business, would regard as giving a receipt—not something conditional, but something outright. In my opinion, if the condition is to be imposed, it must be quite clearly expressed, or be a condition quite clearly to be collected from the circumstance. It must be a condition to which the recipient has bound himself by contract or by conduct.

In my opinion, the learned judge was right, and this appeal must be dismissed with costs.

MORTON L.J. The writing in question in this case does not require a stamp under the Stamp Act, 1891, unless (a) it is a receipt, and (b) it has been "given" within the meaning of the First Schedule. A creditor, who has been paid money, may write on a sheet of paper: "I acknowledge that I have received "1,000*l.* from A. B. who owed me that sum." But unless and until that piece of paper is given to A. B., the debtor, it requires no stamp. I do not pause to consider whether the document which I have described is a document "whereby any money is "acknowledged or expressed to have been received," within s. 101, while it still remains in the creditor's desk and has not been given to the debtor.

(1) [1899] 2 Q. B. 158.

(2) 37 S. L. R. 736.

(3) *Ibid.* 738.

Coming to the facts of the present case, I feel grave doubt if the relevant entry on the card is a "receipt" within the definition in s. 101. It is an entry on a document belonging to the Electric Light Company, made by an employee of the company by way of record in the course of his duty. It is stated in the special case "Save in this respect that the collector's duty is to perform the acts stated"—that includes making the entry on the card in question—"the collector has no authority to give receipts on behalf of the company." I think, if I may respectfully say so, that there is great force in the observations of Lord Trayner with regard to this matter in a passage in *Day v. Glaister* (1), which was not read by the Master of the Rolls. In referring to s. 101 of the Stamp Act, Lord Trayner says this: "it is obvious that the language is capable of covering more than it was intended to express. For, if taken literally, it would cover and include any note or memorandum which a man might make in his own books acknowledging the receipt of 2*l.* or upwards from another. This is plainly not intended by the Act. An entry in his cash book made by A. to the effect that he has received 6*l.* from B. would fall within the words of the Act descriptive of a receipt but are plainly not within its intention or meaning." To that, I would add that Lord Trayner apparently had not in his mind at that moment the further point that a receipt must be "given" before it requires a stamp. That is pointed out by Bray J. in *General Council of the Bar (England) v. Inland Revenue Commissioners* (2), where he says: "It is plain that the attention of Lord Trayner was not called to the words of the schedule 'receipt given'."

Let me assume, however, that the entry in question does amount to a receipt within the meaning of the Act. Was it ever "given?" In my view, it clearly was not. It was contained in a card, deposited in the flat whereof Mr. Oliver was the occupant. If Mr. Oliver, the consumer, left the flat, he clearly had no right to take the card with him. That is recognized at the end of para. 7 of the case: "The electricity prepayment meter card is the property of the company. It remains at the premises on change of occupancy." For the reasons already given by the Master of the Rolls, I think that Mr. Oliver could not have objected if the company had said: "We now propose to take this card away." There is nothing in the contract between the parties, consisting of an application by

(1) 37 S. L. R. 736, 737.

(2) [1907] 1 K. B. 462, 477.

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Mr. Oliver, and a document containing the conditions of supply, which says that Mr. Oliver is to be entitled to retain this document. If there is some agreement outside the conditions of supply, I do not at the moment see what the consideration was for that agreement : nor do I see any reason why it should be implied from the circumstances. However, let me again make an assumption in favour of the Crown's contention. Let me assume that Mr. Oliver could have objected to the removal of that card. The fact remains that the card was the company's property, and that Mr. Oliver only had the very limited right to insist that it should remain in the flat while he was an occupier. In my view, there was still no "giving" of the receipt to Mr. Oliver.

The argument of the Solicitor-General and Mr. Stamp involves them in a number of difficulties which I shall not examine in detail, but I will refer to one, taking first their own definition of what the word "gives" means in the statute "Gives," said the Solicitor-General and Mr. Stamp, means "delivering or making available for use as a voucher." I then drew attention to the fact that that definition did not define the period for which the document was to be made available for use as a voucher, but I received the reply that the definition was quite general and quite simple. If the document was made available for use as a voucher, it was a receipt within the meaning of the Act, and it must be stamped. In order to test this argument, I shall take the case of a debtor who owes 1,000*l.* and pays it in full. The creditor hands to him a receipt—I will call it a receipt for the moment—with a note upon it : "This document remains the property of the creditor and has "to be returned to the creditor at the end of six months." There is no assent by the debtor, let me assume, to this limitation of time, but that is the only receipt which he gets. Has the debtor been given a receipt within the Stamp Act ? At first sight I think the Solicitor-General was inclined to answer that he had not. If that is the right answer, it seems to me to follow that Mr. Oliver was not given a receipt in the present case. Later both the Solicitor-General and Mr. Stamp were inclined to answer "Yes" to the question just stated. They were then asked : Supposing that the receipt is stamped, as you say it ought to be, and the debtor subsequently, either before or after the expiration of the six months, says : "Now, "I want you to give me a receipt which I can keep," would a refusal of that request involve an offence by the creditor under

s. 103, para. 2, of the Act? They replied that it would, because the creditor could not have refused—I think I am quoting their language accurately—to make the receipt available simpliciter and without any condition. If that is so, it leads inevitably to the conclusion that counsel for the Crown are giving a meaning to the phrase “give a receipt” in para. 1 of s. 103 different from that which they give to the same phrase in para. 2. That is an illustration of the difficulties arising from the contention by the Crown.

I would like to reserve for consideration, if and when the point arises, the question whether a receipt given subject to a condition that it shall be returned to the giver of the receipt at the expiration of some period, or upon some other condition, can ever be a receipt which is “given” within the meaning of the Stamp Act. That question does not arise in the present case, in my view, because the so-called receipt was never given to the consumer at all. Therefore, I have formed no view upon that question. I agree that the judgment of the learned judge was right, and that this appeal should be dismissed.

SOMERVELL L.J. I agree with the judgments which have been delivered, and the reasons and conclusions which have been come to, and I have very little that I desire to add. The learned judge dealt with the issue in this way. He said: “In my opinion, the word ‘gives’ in para. 1 of s. 103 means ‘what it says, that the person to whom the receipt is given ‘can keep it as his own.’” It was pointed out in the course of the argument that the actual piece of paper may not be originally the property of the payee; it may be produced by the payer. I think the learned judge clearly meant this: “That a ‘receipt is given when, after the transaction has taken place ‘between the parties, the payer is in possession of a document ‘which must be a receipt within s. 101 which he can keep as ‘his own.’” I do not, of course, exclude the possibility of a special arrangement clearly made between the parties, such as was referred to by the Master of the Rolls, as appearing in the normal form of receipt when a deposit is made and a deposit receipt given.

I should also like to say that there is no suggestion in this case that the position as already explained by the Master of the Rolls was a colourable arrangement arrived at between the parties in order to avoid the payment of duty. The Solicitor-General pressed on us that the word “given” in this context

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should be read as meaning "made available." I join issue with the argument at that initial point. There are many cases which one can think of in which something might be made available in the ordinary sense of that word, of which no one could say that it had been given. A man might, for instance, have a circular saw and think it right to make it available to his neighbour for his use for a limited time, but it would clearly be an inapt use of the word "given" to say that he had "given" the circular saw to his neighbour. I prefer the meaning which the learned judge places upon the word in its context, and I think that is the meaning which it has. So construed, for the reasons which have been given by my brethren, it seems to me impossible to say that a receipt was given to the consumer in this case.

Appeal dismissed.

Solicitors : *Solicitor of Inland Revenue ; Sydney Morse & Co.*

H. C. G.

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Jan. 15.

Atkinson J.

CALVERT (INSPECTOR OF TAXES) *v.* WAINWRIGHT.

Revenue—Income tax—Tips to taxi drivers—Assessability—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), sch. E., r. 1.

Tips received by taxi drivers in the ordinary way are assessable to income tax as part of the profits arising out of their employment.

CASE STATED by Commissioners of Income Tax.

The respondent appealed to the commissioners against an assessment of 75*l.* made on him for the year commencing April 6, 1944, under sch. E. to the Income Tax Act, 1918, in respect of tips received from passengers in his capacity as a taxi driver in the employment of Reuben Thompson, Ltd.

In the course of several hearings before the commissioners evidence was given that the respondent received a definite wage and that tips were no part of the bargain. Evidence was also given by the respondent as to the number and type of his daily journeys and the amounts received by way of tips.

The commissioners, having considered the circumstances, were of opinion that the tips given to the respondent were not profits or gains of his employment, but were gifts given to

him personally and were therefore not assessable. They therefore allowed the appeal and discharged the assessment.

The Crown appealed.

D. L. Jenkins K.C. and *Reginald Hills* for the Crown.
Senter for the respondent.

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ATKINSON J. This case raises the comparatively simple point: Are tips which are received by taxi drivers in the ordinary way assessable to income tax? In my view, the commissioners, when they find that the tips received by the respondent were gifts given to him personally and, therefore, not assessable, show that they have completely misunderstood the law applicable. An affidavit, which has been read, and which I accept, as it has not been challenged, states what happened and how four authorities were cited to them. I shall deal with the authorities in a moment, but the principle which they establish, if I understand them correctly, is that tips received by a man as a reward for services rendered, voluntary gifts made by people other than the employers, are assessable to tax as part of the profits arising out of the employment if given in the ordinary way; but, on the other hand, that personal gifts, which means gifts to a man on personal grounds, irrespectively of and without regard to the question of whether services have been rendered or not, are not assessable. The commissioners have obviously misunderstood what is meant by a personal gift. They have not found that the tips were personal gifts: they have found that they were gifts given to the respondent personally, which is a totally different thing. Every tip is given to a man personally, but that merely means that it is given to him for his own benefit, and not for that of the employers. Having listened to the cases, the commissioners thought the words "personal gift" meant given to him personally, whereas it is quite clear from the cases that what is meant by "personal gifts" is a condensation of the full sentence personal gifts given on personal grounds other than for services rendered. On the evidence set out in the case, it is, to my mind, quite impossible, as a matter of law, to come to a decision other than that these tips were assessable to income tax.

Referring to the cases, in *In re Strong* (1), the headnote is: "A gift of money, raised by voluntary subscription, and made annually to a Minister of religion by his congregation, is assessable." The matter was put in the judgment in these

(1) (1878) 1 Tax Cas. 207.

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words: "It is with some reluctance that I have formed the opinion that the commissioners are wrong, and that the appellant is liable for income tax on the 100*l.* mentioned in the case. It is true that it is a voluntary contribution by the parishioners, one which they are under no obligation to make, and which they may withdraw at any time. But still it is a payment made to the appellant as their clergyman, and is received by the appellant in respect of the discharge of his duties of that office, which is one of public employment in the sense of the statutes." The point there was, was the gift received in respect of the discharge of the duties of his office? The mere fact that it was a voluntary payment did not prevent the payment being assessable. *Herbert v. McQuade* (1) was another case connected with a clergyman in which it was decided that grants made in augmentation of the income of a benefice were assessable. Collins M.R. said (2): "Undoubtedly these facts give rise to very nice considerations; and the question is on which side of the line this particular augmentation falls. If, as the respondent contended, it was in fact a gift personal to himself, I do not think that it would fall within sch. E.; if, on the other hand, it accrued to him by virtue of his office of incumbent, the respondent himself could hardly dispute his liability." Those sums accrued to him by reason of his employment. In *Blakiston v. Cooper* (3), which was the Easter offerings case, the principle was stated by the Lord Chancellor in this way: "In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional amount, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present." To my mind, that puts the principle very clearly. The distinction would apply to a taxi driver in this way, to give an illustration. Suppose somebody who has the same taxi every day, which comes in the morning as a matter of course to take him to his work, and then takes him home at night. The ordinary tip given in those circumstances would be something which would be assessable, but

(1) [1902] 2 K. B. 631.

(3) [1909] A. C. 104, 107.

(2) *Ibid.* 641.

supposing at Christmas, or, when the man is going for a holiday, the hirer says : " You have been very attentive to me, here is a " 10*l.* note," he would be making a present, and I should say it would not be assessable because it has been given to the man because of his qualities, his faithfulness, and the way he has stuck to the passenger. In those circumstances, it would, in my opinion, be a payment of an exceptional kind. But a tip given in the ordinary way as remuneration for services rendered is well within the principles defined in that case. One comes a little more closely to tips in *Seymour v. Reed* (1), where the House of Lords took the view, differing from the majority in the Court of Appeal, that the proceeds of a benefit match were not assessable. Lord Cave L.C. said (2) : " it must " now (I think) be taken as settled that they include " —" they " meaning the taxable profits—" all payments made " to the holder of an office or employment as such, that is to " say, by way of remuneration for his services, even though such " payments may be voluntary, but that they do not include a " mere gift or present (such as a testimonial) which is made to " him on personal grounds and not by way of payment for his " services." I cannot conceive of any more apt words than " by way of remuneration for his services, even though such " payments may be voluntary." I doubt if the payments made to a taxi driver could be described in more apt language than that. In *Beynon v. Thorpe* (3), Rowlatt J. was dealing with the case of a pension. In that case the respondent had resigned his position as managing director to a limited company on account of ill health, and had been voted a pension. Rowlatt J. said (4) : " The best known instances are, of course, " the offerings made voluntarily to ministers of religion " which give rise to many cases, that is they become profits or " gains of an office, because although they are voluntary it is " by the office which is the source of the Minister's taxable " income that he has been given them. So also voluntary " payments made to persons exercising employments ; gratui- " ties to servants and so on, are, undoubtedly, because they are " servants—I do not mean to say from master to servants but " to people like waiters, to put a concrete example—gratuities " to people of that kind, which they get because they are " carrying on a particular employment : although they have no " right to ask for them, when they do get them they get them

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(1) [1927] A. C. 554.

(3) (1928) 14 Tax Cas. 1.

(2) Ibid 559.

(4) Ibid 13.

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" as profits or gains in their employment and therefore they are
 " profits or gains which are taxable. But a mere gift is not a
 " profit or gain at all." Again, if that is the law, there can
 be no doubt about this case. Finally, in *Hunter v. Dewhurst* (1),
 Lord Atkin referred to tips in this way: " But the circum-
 " stances in which the first payment was made seem to me to
 " negative the proposition that the payment was received
 " ' from ' the office. Rule 1 appears to me to indicate emolu-
 " ments either received from the employer or from some third
 " party (such as tips, permitted commission and the like) as a
 " reward for services rendered in the course of the employ-
 " ment."

Applying the principle there laid down to the tips of taxi
 drivers, I cannot see that there can be any doubt whatever but
 that these tips are assessable, and I so hold. The case will have
 to go back to the commissioners to fix the amount.

Appeal allowed.

Solicitor for appellant : *Solicitor of Inland Revenue.*

Solicitors for respondent : *Pattinson & Brewer.*

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(1) 16 Tax Cas. 605, 644.

Approved. LONDON COUNTY TERRI-
 TORIAL AND AUXILIARY FORCES
 ASSOCN. v. NICHOLS. [1948] 2 All
 R. 432.

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Jan. 24.

Lord Goddard
C.J.,
Humphreys and
Lewis J.J.

RUDLER v. FRANKS.

*Landlord and tenant—Lease of farm being Crown property—Cottage on
 farm let by lessee to agricultural tenant—Claim for possession by
 landlord—Warrant under Small Tenements Recovery Act, 1838—
 Application to cottage of Rent Restriction Acts.*

The tenant of a farm which he held on lease from the Crown
 and which was therefore Crown property, let a cottage on the farm
 to a tenant. Subsequently he sought to recover possession of the
 cottage by a warrant under the Small Tenements Recovery Act,
 1838. The justices refused to grant the warrant holding
 that as between the landlord and tenant of the cottage the Rent
 Restriction Acts applied :—

Held, that the Rent Restriction Acts did not apply as the
 cottage was Crown property, and the Crown was not affected by
 the Rent Restriction Acts as they applied in rem and not in

personam, and the fact that the landlord of the cottage was a lessee of the cottage from the Crown did not make any difference, and that therefore he was entitled to a warrant under the Small Tenements Recovery Act, 1838, for the recovery of possession of the cottage.

Clark v. Downes (1931) 145 L. T. 20 followed.

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CASE STATED by Wiltshire justices.

The appellant, Rudler, was a farmer who farmed on Crown lands. He held a lease of his farm from the Commissioners of Crown Lands. He sublet a cottage on his farm to the respondent, Franks, who was an agricultural labourer, at a rent of 5s. a week. The cottage being on the farm was therefore Crown property.

The appellant sought to recover the cottage by a warrant under the Small Tenements Recovery Act, 1838. The justices however, held that as between landlord and tenant of a cottage occupied by an agricultural labourer the Rent Restriction Acts applied and refused to grant a warrant for the recovery of the cottage.

J. T. Malony for the appellant. The justices took an erroneous view of the law. The Rent Restrictions Acts do not affect the Crown, and they apply in rem and not in personam, so that as long as the property in question remains the property of the Crown, as this cottage remains, the Rent Restriction Acts cannot apply to it. *Clark v. Downes* (1), subsequently considered and approved by the Court of Appeal in *Wirral Estates, Ltd. v. Shaw* (2), entirely covers, and is conclusive of this case.

The respondent did not appear.

LORD GODDARD C.J. I am not at all surprised that the justices decided as they did, because I think it must be a surprise for anyone to learn that if the property sought to be recovered is Crown property, notwithstanding that the tenancy is a sub-tenancy created by the tenant of the Crown, the Rent Restriction Acts do not apply to the cottage or house so long as the property remains Crown property. I need not consider what would happen if the Crown sold the reversion. So far as this court is concerned it seems that the case is concluded by the decision of the Divisional Court, consisting of Lord Hanworth M.R. and Romer L.J., sitting as additional judges of the King's Bench Division, in *Clark v. Downes* (1). That case has

(1) (1931) 145 L. T. 20.

(2) [1932] 2 K. B. 247.

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also been considered and must be taken as approved by the Court of Appeal of which the same two judges were members, in *Wirral Estates, Ltd. v. Shaw* (1). As I understand the decision it is this. The Rent Restriction Acts apply in rem and not in personam. The meaning of that is that the Rent Restriction Acts attach or apply to the property itself, and, therefore, as the Crown is not bound by the Rent Restriction Acts the cottage or house as long as it remains Crown property, never becomes affected by them. If the tenancy of the cottage had been granted by the Crown, I think no one could have disputed the fact that the Rent Restriction Acts would not apply, because the Crown not being named in the Acts, obviously upon all the well known rules of construction is not affected by the Acts. The reason why the Acts do not apply when the tenants of the Crown creates a sub-tenancy is first because, as I have just said, the Acts operate in rem and not in personam and so are never attached to the house at all. It was also pointed out by Romer L.J. that the Crown's rights would or might be affected because if the Crown sold the reversion the Crown would probably receive a less sum for the property if the Acts applied than if they did not apply, because the purchaser would not be able to obtain vacant possession. We are not presuming in any way to limit our judgment to cases where the Crown is still the owner of the property, because it seems clear from the *Wirral* case (1) that although the Crown sells the reversion, the immunity of the property from the operation of the Acts would extend so long as the tenancy granted by the Crown remains in existence. It is, however, not necessary for us to discuss that question here. In my opinion this case cannot be distinguished from *Clark v. Downes* (2), and, therefore, we must set aside the decision of the justices, and remit the case to the justices with a direction to issue a warrant for the recovery of the cottage.

HUMPHREYS J. I agree. I think the case is concluded by the decision in *Clark v. Downes* (2).

LEWIS J. I agree.

Appeal allowed.

Solicitors for appellant: *Darley, Cumberland & Co., for Wansbroughs, Robinson, Tayler and Taylor, Devizes.*

R. F. S.

(1) [1932] 2 K. B. 247.

(2) 145 L. T. 20.

PHILLIPS (INSPECTOR OF TAXES) *v.* BOURNE.

1947
Jan. 16, 17,
30.

Revenue—Income tax—Profits from occupation of land—Lands insufficient for keep of cattle brought on—"Cattle" includes pigs—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Rules applicable to Case III of Sch. D., r. 4.

Atkinson J.

The word "cattle" in r. 4 of the Rules applicable to Case III of Sch. D to the Income Tax Act, 1918, includes pigs.

CASE STATED by General Commissioners of Income Tax.

At a meeting of the General Commissioners held at Stoke-on-Trent on June 27, 1945, the respondent appealed against assessments under sch. D made on him as a cattle dealer and milk seller as to the year 1940-41 in the sum of 1,500*l.* and as to the year 1941-42 in the sum of 1,500*l.*

At the hearing the following facts were proved or admitted. The respondent commenced farming on December 1, 1939. The area of the farm, which he occupied as tenant, was forty-five acres, being thirty-three acres of pasture and twelve acres arable. The rent of 130*l.* was assessed under sch. B for the two years under appeal on values of 130*l.* and 108*l.* (the reduction being due to the requisitioning of nine acres in 1940). The respondent kept between thirty and forty cows and sold the milk to milk dealers. Early in 1940 a large armament factory was erected near the farm and canteens were opened, and the respondent contracted to supply milk to and take swill from the canteens. The respondent used the swill to fatten pigs which he bought at approximately three months old, kept for three or four months and then sold for bacon. The greatest number of pigs on the farm at any one time was sixty, but the numbers varied. The pigs were fed in buildings, approximately ninety per cent. of the food being swill from the canteens, the remaining ten per cent. being grown on the farm. The pigs were all sold under Ministry of Food instructions to bacon factories. The respondent did not breed pigs and was not a licensed pig dealer. During the relevant period the respondent continued his usual farming activities. No special labour was employed to deal with the pigs; and no land was specifically set aside for the pigs or special piggeries erected. The profits from all the respondent's farming activities in each year exceeded 2,000*l.*

On behalf of the respondent it was contended (a) that pigs were not cattle within r. 4 of case III of sch. D to the

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Income Tax Act, 1918 (1) ; (b) that the fattening of pigs was a part of his normal activities as a farmer ; (c) that the land was not insufficient for the keep of cattle brought on the land ; and (d) that the assessments should be discharged.

On behalf of the Crown it was contended (a) that cattle in r. 4 included pigs ; (b) that as the respondent purchased, fattened and sold pigs, he was a dealer in cattle within r. 4 ; (c) that the respondent was a dealer in or seller of milk ; (d) that the land occupied by the respondent was insufficient for the keep of cattle brought on the land so that the assessable value afforded no just estimate of the profits ; (e) that accounts should be produced so that the correct assessments could be ascertained ; and (d) that, alternatively, the purchase of pigs and their sale after fattening was in the nature of trade and the profits were assessable under case I of sch. D.

The commissioners decided (a) that the respondent was properly assessed under sch. B and should not be assessed under case I of sch. D ; (b) that the respondent was not a cattle dealer, but was a seller of milk and so, *prima facie*, within r. 4 ; and (c) that as, in their opinion, pigs were not cattle within the rule the answer to the question whether the lands were insufficient for the keep of cattle brought on must be given in the respondent's favour, and so the appeal succeeded. The commissioners also held that if the court held that pigs were cattle within the rule there was evidence that the assessable value was no just estimate of the profits.

The Crown appealed.

D. L. Jenkins K.C. and *R. P. Hills* for the Crown. The commissioners were wrong in holding that pigs were not cattle within r. 4 of case III of sch. D. It is stated in the New Oxford English Dictionary that the term "cattle" has at

(1) Income Tax Act, 1918, Rules applicable to Case III of Sch. D., r. 4 : " If the commissioners find that lands which have been charged under Schedule B on the assessable value, and which are occupied by a dealer in cattle or a dealer in or a seller of milk, are insufficient for the keep of the cattle brought on to the lands, so that the assessable value affords no

" just estimate of the profits, they
 " may require a statement of the
 " profits to be delivered, and
 " charge such further sum thereon
 " as, together with the charge
 " under Schedule B, will make up
 " the full sum wherewith the
 " dealer or seller ought to be
 " charged in respect of the like
 " amount of profits charged
 " according to Rule 2 of the rules
 " applicable to this Case."

different times and places been used to include horses, asses, oxen, cows, sheep, goats and swine, although the tendency in recent times has been to confine its meaning to bovine animals. In 1806, when the provisions now contained in r. 4 were first enacted in the taxing act of that year, "cattle" would almost certainly have been construed to include pigs, and the same would probably have been true in 1842 when the original enactment was reproduced in s. 100 of the Income Tax Act, 1942. That section was re-enacted in r. 4 in almost precisely similar language. It is proper, therefore, that the court should consider what the meaning of that language was in the original section.

Rule 4 is aimed at persons who make a profit not out of the land but out of something brought on to the land which the land itself cannot support. The buying and selling of pigs was in the nature of a trade or business carried on on the land. The present case should therefore be held to come within the rule.

In *Rex v. Paty* (1), a mare was held to be "cattle" within the meaning of the statute 9 Geo. 1, c. 22, which prescribed penalties for unlawfully and maliciously killing, maiming or wounding cattle. Similarly pigs and asses were held to be cattle within the meaning of the same Act in *Rex v. Chapple* (2) and *Rex v. Whitney* (3) respectively. In *Fletcher v. Lord Sondes* (4) Best C.J. referred to the meaning of "cattle" in a statute of Geo. 2 and inferred that at that time the word was not restricted to bovine animals. Again in *Wright v. Pearson* (5) "cattle" in the statute 28 & 29 Vict., c. 60 (which dealt with injuries done by dogs) was held to include horses. Finally in *Child v. Hearn* (6) it was held that, on the construction of an enactment relating to fencing against straying cattle, the word "cattle" included pigs. Those cases provide a strong body of judicial authority that in interpreting the word "cattle" in an Act of Parliament it should be held to include swine unless clearly restricted by its context to animals of the bovine species. The decision of the commissioners that "cattle" in r. 4 did not include pigs was therefore wrong and ought to be reversed.

Graham-Dixon for the respondent. There is more than one issue in this case. In the first place the respondent is not a

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(1) (1770) 2 Wm. Bl. 721.

(2) (1804) Russ. & Ry. 77.

(3) (1824) 1 Mood. C.C. 3.

(4) (1826) 3 Bing. 501, 580.

(5) (1869) L. R. 4 Q. B. 582.

(6) (1874) L. R. 9 Ex. 176.

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dealer at all. The rule deals with a dealer in cattle. The expression horse dealer or cattle dealer would be understood by any ordinary Englishman to mean a man who buys and sells horses or cattle. The respondent here is a farmer who bought young pigs to fatten. Secondly there is no finding of fact that the land was insufficient for the keep of the pigs.

As to the meaning of cattle, the word should be construed strictly. A man can only be taxed by unambiguous terms. The exact meaning of cattle has always been ambiguous but no reasonable man would refer to pigs as cattle. In returns which have to be submitted to the Ministry of Agriculture pigs are dealt with in a separate section and are not included under the heading "cattle." Legal decisions on the meaning of the word are conflicting. In *Child v. Hearn* (1) there was every reason for construing "cattle" to include a pig, but the statute in question there was not a taxing statute. Again in *Rex v. Chapple* (2) there was every reason for construing the word in its widest possible sense. In the present case it is significant that the word "cattle" is used twice: this suggests that the whole rule is to be read together. The rule is intended to apply only to land used as a temporary home or "stand" for cattle awaiting disposal. In any case the meaning of the word is ambiguous and where an ambiguous word is used in a revenue statute it should be construed in favour of the taxpayer.

D. L. Jenkins K.C. replied.

Cur. adv. vult.

Jan. 30. ATKINSON J. The scheme of this legislation is simple. A farmer *prima facie* is taxed on his profits, but, if he has only a small place of the annual value, formerly of 300*l.* and now of 100*l.* a year, his profits will not be inquired into, but he will be assessed merely on the assessable value of his holding. That is fair enough if his profits are made from the occupation of the land. But, if he carries on a trade on the land and makes considerably more than the annual value, the profits cannot be said to be made out of the occupation of the land any more than the profits from a factory on the land. They are profits made on the land, they are not profits made from the occupation of the land. Under r. 4 of the rules applicable to case III of sch. D, therefore, if you bring on more cattle than you can maintain and keep on the land and deal in cattle or deal in milk so that you make far more profits than the

(1) L. R. 9 Ex. 176.

(2) Russ. & Ry. 77.

assessable value, then you have to be taxed as if you were carrying on a trade.

The question in the present case is : What is the meaning of the word "cattle" in that rule ? The commissioners found that pigs were not cattle and that the land was sufficient to maintain such cattle as the respondent had—that is, the cows ; but there is a clear implication that if the pigs were cattle, the land was not able to maintain them, and that more animals had been brought on to the land than the land could maintain. They found as they could not help doing in those circumstances, "that the assessable value was no just estimate of the profits." The issue is thus reduced to the simple question : Are pigs cattle ? Mr. Jenkins for the Crown approached this question in three ways. The first one I will call the "dictionary" way. It is clear from the New Oxford English Dictionary that at one time the word "cattle" was a collective name for livestock, for live animals held as property. The dictionary states : "The application of the term has varied greatly, according to circumstances of time and place, and has included camels, horses, asses, mules, oxen, cows, calves, sheep, lambs, goats, swine, etc. The tendency in recent times has been to restrict the term to the bovine genus, but the wider meaning is still found locally, and in many combinations Now usually confined to, or understood of, bovine animals." It is plain that at one time the word "cattle" would have included pigs, and that it may do so to-day. One has to look at the surrounding circumstances to see in what sense it has been used. At the time when the present translation of the Bible was made, the term "cattle" was not restricted to bovine animals : one reads : "Adam gave names to all cattle." And there are many quotations in the dictionary I have referred to which show that it was used in the widest sense. So that I start with this, that "cattle" may include pigs. I bear in mind the argument which was pressed upon me that, in taxing matters, there is no room for intendment, and that burdens have to be clearly and unambiguously imposed ; but I am not infringing that rule when I say that it is clear that the word "cattle" may include pigs. Rule 4 is a reproduction of s. 100 of the Income Tax Act, 1842, and is couched in almost precisely the same language. I am told that the latter section was a reproduction of a section which appeared in the Taxing Act of 1806. The point is made that in interpreting a section which is a reproduction of a previous section, it is right to look at

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the meaning which the original section had. There is no doubt that in 1806 the word "cattle" would have been construed so as to include pigs. Even in 1842 (which is over 100 years ago) I think the same result would have followed. So much for the dictionary approach.

The next point is to consider at what the rule is aiming. I have touched upon this already. If one is merely making profits from the occupation of land, say a small-holding, which is assessed at less than 300*l.* (now 100*l.*) there is no inquiry into profits. That is all very well as long as the profits made arise from the occupation of the land, but, if the profits do not arise from the occupation of the land, but from some industry or trade carried on on the land, then a totally different position is created. What is clearly aimed at here is the bringing of a number of animals on to the land, which the land cannot possibly support, and dealing in them, or, if they are bovine animals, dealing in milk, and making profits far in excess of the sum upon which one is assessed. The present case is a typical example of what r. 4 is designed to cover. Here is a man who has quite a small farm and he brings some fifty pigs on to it. I think the case refers to the fact that they were at times allowed to root about the fields, but they were not getting their food in that way: ninety per cent. of their food came from outside. They were in pig-styes, loose boxes and the like. It is plain that the profits made out of this trade in pigs did not arise from the occupation of land; they arose from a business or trade carried on on the land, which is quite a different thing. It is clear, therefore, that these pigs were within the spirit of this rule. Therefore, even if the matter stopped there, I think one would be entitled, if not bound, to say, that pigs are cattle within the meaning of the rule.

Mr. Jenkin's third line of argument was to call my attention to a number of cases in which the expression "cattle" had been interpreted. The first was *Rex v. Paty* (1). In that case, it was necessary to interpret what was known as the Black Act (9 Geo. 1, c. 22): "If any person or persons shall unlawfully "and maliciously kill maim or wound any cattle," certain results were to follow. The question was whether a mare was cattle. Blackstone J. had the point submitted to all the judges, and unanimously they held that the word "cattle" included a mare; in other words, they rejected the narrow interpretation of the word which suggested that it merely

(1) 2 Wm. Bl. 721.

referred to cows and animals of the bovine class. The next case was *Rex v. Sarah Chapple* (1), where a woman was prosecuted under the same Act for maiming or killing two pigs. Again, the question was submitted to all the judges, I think, except two; and all agreed that pigs were cattle within the meaning of that Act. In *Rex v. Whitney* (2), another case under the same Act, two asses were held to be cattle, eleven judges having been called together to determine the point. So on three occasions the narrow meaning of the word "cattle" was rejected. The next case, *Fletcher v. Lord Sondes* (3), was not about cattle at all. The facts do not matter for the purpose of the present case, but there is a passage in the judgment of Best C.J. (4) which shows what the meaning of the word "cattle" was supposed to be then: "The statute of Elisabeth is a penal law. The rule to which I allude requires that all penal laws should be construed strictly, that no case should be holden to be reached by them but such as are within both the spirit and letter of such laws. If these rules are violated, the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws. If general words follow an enumeration of particular cases, such general words are by another rule of construction holden to apply only to cases of the same kind as those which are expressly mentioned. By 14 Geo. 2, c. 1, persons who should steal sheep or any other cattle were deprived of the benefit of clergy. The stealing of any cattle, whether commonable or not commonable, seems to be embraced by these general words, any other cattle; but by 15 Geo. 2, c. 34, the legislature declared that it was doubtful to what sorts of cattle the former Act extended besides sheep, and enacted and declared that the Act was meant to extend to any bull, cow, ox, steer, bullock, heifer, calf and lamb, as well as sheep, and to no other cattle whatsoever." That passage shows that at that time the term "cattle" was not restricted to bovine animals. In *Wright v. Pearson* (5), the question was as to the meaning of the word "cattle" in 28 & 29 Vict., c. 60, an Act which gave a right of damages against the owners of dogs for injuries done to cattle or sheep, and it was held that "cattle" there included horses and mares. The next time that the word was interpreted was in *Child v. Hearn* (6),

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(1) Russ. & Ry. 77.

(2) 1 Mood. C. C. 3.

(3) 3 Bing. 501.

(4) Ibid 508.

(5) L. R. 4 Q. B. 582.

(6) L. R. 9 Ex. 176.

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where a section of the Railways Clauses Consolidation Act, 1845, imposing an obligation to fence against the straying of cattle had to be construed. In that case pigs had strayed on the land and damage had been caused, and it was held that the expression "cattle" did include pigs. In every one of these cases in which the meaning of the word "cattle" had to be construed, the narrow meaning was rejected and the wider meaning was adopted. I agree that they were all decisions on a particular Act, but they do establish that, in interpreting the word "cattle" in an Act, one has to consider what is the evil aimed at: With what is the section intended to deal? If one finds that the word "cattle" must have been used in the wider sense, one must give effect to it.

The conclusion I have come to is that the word "cattle" in this section does include pigs, that the decision of the commissioners was wrong, and that the appeal must be allowed with costs. The case must go back to the commissioners to arrive at the true assessment of profits, and there will be a declaration that, in the opinion of the court, "cattle" in r. 4 includes pigs and a declaration that the lands were insufficient to maintain the pigs.

There is one thing I ought to add. There was a point taken on the evidence that the respondent was not a dealer. I am quite satisfied that he was and I think the commissioners implied that too. He was certainly dealing in pigs in addition to selling the milk of the cows. I think there is nothing in the argument that he was not a dealer in pigs.

Appeal allowed.

Solicitor for appellant : *Solicitor of Inland Revenue.*

Solicitors for respondent : *Ellis & Fairbairn, Reading.*

H. A. P.

BRIERLEY v. PHILLIPS.
BRIERLEY v. BREAR.

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Jan. 22.

Emergency legislation—Food—Eggs—Control and prices—Offences—Selling and buying at price exceeding prescribed maximum—Eggs sold for hatching—Interpretation of regulations—"Consumer"—Eggs (Control and Prices) (Great Britain) Order, 1944 (St. R. & O. 1944, No. 502), arts. 7, 13, sch. 2, Pt. 2. Lord Goddard C.J., and Humphreys J.

In Part II of sch. 2 to the Eggs (Control and Prices) (Great Britain) Order, 1944, which lays down the maximum price which can be charged for eggs, inter alia, "on a sale by a producer owning "twenty-five head of poultry or less to a consumer," the expression "consumer" must be given its ordinary meaning and does not include a person to whom eggs are sold for the purpose of hatching.

CASE STATED by justices.

At a court of summary jurisdiction sitting at Skipton, an information was preferred by the appellant, an inspector of the Ministry of Food, charging the respondent Phillips with having, on May 13, 1946, sold eggs to the respondent Brear at a price exceeding the appropriate maximum price specified in Part II of the Second Schedule to the Eggs (Control and Prices) (Great Britain) Order, 1944, contrary to art. 7 of that Order as amended (1). A second information was preferred by the appellant charging the respondent Brear with having bought eggs from a producer, namely, the respondent Phillips, at a price exceeding the appropriate maximum price contrary to the same order.

At the hearing the following facts were proved or admitted. At all material times the respondent Phillips was a producer of eggs having under his care, control or management, twenty-five head of poultry or less. On May 13, 1946, the respondent

(1) Eggs (Control and Prices) (Great Britain) Order, 1944, art. 7 (as amended by St. R. & O., 1945, No. 645): "(1.) A person shall "not buy or sell any eggs except "in accordance with the following "provisions . . . (c) in any other "case the price shall not exceed "the appropriate maximum price "specified in Part II of [the "Second Schedule to this Order] ". . . " Schedule 2, Part II (f): "On a sale by a producer owning "twenty-five head of poultry or "less to a consumer—2s. per "doz." Article 13 (as amended by St. R. & O. 1944, No. 874): "(1.) The provisions of this Order "shall not . . . apply to eggs "bought or sold for the purpose "of hatching, provided that— "(a) the buyer shall have furnished "the seller with a declaration in "writing signed by the buyer "stating that the eggs are being "bought for the purpose of "hatching . . . (b) each egg "shall have been indelibly and "legibly marked by the seller "with the letter 'H', in red."

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Phillips sold and delivered to the respondent Brear seven dozen eggs at 10s. a dozen, being a price exceeding 2s. a dozen, the appropriate maximum price specified in Part II of Schedule 2 to the Eggs (Control and Prices) (Great Britain) Order, 1944. The eggs were sold for the purpose of hatching, but the requirements of art. 13 of that order had not been complied with in that no declaration as therein provided had been furnished nor had each egg been indelibly and legibly marked by the respondent Phillips with the letter H in red.

It was contended on behalf of the respondents that as the eggs were sold for the purpose of hatching, art. 7 did not apply.

It was contended on behalf of the appellant that art. 7 applied notwithstanding that the eggs were sold for the purpose of hatching, since art. 13 had not been complied with.

The justices were of opinion that the contention of the respondents was correct and dismissed the informations, but on the application of the appellant they stated these cases for the opinion of the High Court.

H. L. Parker for the appellant.

Ahern for the respondents.

LORD GODDARD C.J. These two cases stated raise the same point. They arise out of a sale of eggs. The seller is charged with selling above the maximum price, and the buyer is charged with buying above the maximum price. It is necessary to look with some care at what are the offences charged. They are, in the first case, that the respondent Phillips "did sell" eggs to one, Richard Campbell Brear, at a price exceeding the "appropriate maximum price specified in Part II. of the Second" Schedule of the said Order contrary to art. 7 as amended," and, in the other case, that the respondent Brear "did buy from" a producer . . . at a price exceeding the appropriate "maximum price." In each case the producer, that is, the person who owns the hens which lay the eggs, is a person who has the "care, control or management of twenty-five head of" "poultry or less"; in other words, he is one of those small producers of eggs who keep domestic fowls and sell the eggs.

With regard to the order, I start by saying that it is one which one would hope could be understood by the class of persons against whom these prosecutions are directed. It seems to be an order which provides argument for junior counsel for the Treasury and another learned counsel, and certainly is not

very clear to two judges of the High Court who are sitting to try these two cases, and yet it is an order which is creating a criminal offence. It is surely desirable that orders creating criminal offences should be stated in language which the persons who may commit the offences—in this case, quite humble people, like cottagers—can understand. It is a very serious thing to produce orders, whether under Defence Regulations or otherwise, which create serious offences, if they are couched in language which does not make clear whether a person is committing an offence or not. I am certainly not prepared to support such orders and to find persons guilty of criminal offences when the orders which they are charged with violating are couched in language which is open to all sorts of meanings and causes all sorts of difficulties, so that the persons to whom they apply cannot know whether they are acting legally or not, unless possibly they get counsel's opinion, or at any rate a solicitor's advice.

In this case it is said that respondents have committed an offence by selling and buying above the maximum price contained in Part II of the second schedule. It is said that a producer owning twenty-five head of poultry or less has sold eggs to a consumer. The price in the second schedule is 2s. a dozen. These eggs, which were sold for hatching, were sold at 10s. a dozen. The first question is, has there been a sale by a producer owning twenty-five head of poultry or less to a consumer? What does "consumer" mean? If I were asked what "consumer" meant in an order or a statute, the first thing I would direct myself to do would be to give to the word the ordinary meaning which the English language attaches to it. The ordinary meaning which the English language would attach to that word in relation to an egg is a person who is going to eat the egg or to use it in the process of cooking in his own house. If I buy an egg for the purpose of putting one of my hens on it to hatch it I do not consume that egg. I should not have thought anybody could by any possibility have said that a person who buys an egg for the purpose of hatching it is a consumer of an egg.

I think that that view is supported by art. 3 of this order which refers to a producer having under his care, control or management more than twenty-five head of poultry and provides that he shall not sell or dispose of the eggs except to a licensed buyer or packer, but that that provision "shall not" prohibit the use of fresh eggs by the producer thereof for

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"consumption in his own household or by persons resident in an "institution carried on by him." There is no doubt what the word "consumption" means there, and consumption is what a consumer does. What that article is saying is that a man who has more than twenty-five head of poultry must only sell his eggs to a licensed buyer or packer, but he may consume them in his own household. Under the same article a producer having under his care, control or management twenty-five head of poultry or less may not dispose of his eggs "to any "person for the purposes of a catering establishment carried on "by him or to a manufacturer for the purposes of his manu- "facturing business, and no person shall buy or obtain any "such eggs from that producer for re-sale or for the purpose of "any catering establishment or manufacturing business carried "on by him, provided that the restrictions imposed by this "paragraph shall not prohibit the sale of such eggs to a licensed "buyer or licensed packer." Then, in the next paragraph, it is provided: "No person shall dispose of or sell or supply any "home-produced preserved eggs or use any such eggs for the "purposes of a catering establishment or manufacturing "business, provided that--(a) the restrictions imposed by this "paragraph shall not prohibit the use of such eggs by the person "who preserved them, for consumption in his own household." Here again "consumption" clearly means eating or using in the process of cooking.

It seems to me that those provisions reinforce the view I have taken of the meaning to be attached to the word "consumer" in Part II of the second schedule where it says that on a sale by a producer owning twenty-five head of poultry or less to a consumer, the price is to be 2s. a dozen. It would have been perfectly easy, if it was intended to apply the maximum price of 2s. a dozen to any sale by a producer, to have said: "On a sale "by a producer to a purchaser," but that is not what the draftsman has said. He has said "to a consumer." Therefore, as far as I can see, there is no maximum price fixed in the order for the sale by a producer owning twenty-five head of poultry or less to a person for the purpose of hatching. I am certainly not prepared to give to the word "consumer" a meaning other than the ordinary meaning which the English language has attached to it. In my opinion, therefore, the offences which were charged in this case was not committed, the decision of the magistrates ought to be upheld and both the appeals should be dismissed with costs.

HUMPHREYS J. I am of the same opinion. It is to be observed that, in preparing the form of summons in this case, the prosecution were careful not to charge the only offence which is appropriate to the facts of this case, that is, a sale to a consumer. In the case of the seller, the charge is that he being a producer sold to a person whose name is given, and that is all, but that is not an offence at all, and if objection had been taken the information would have had to have been amended by adding the words, "to a consumer, to wit, one "Richard Campbell Brear." In the same way, in the other case, which is an information against Brear, the only charge is that he did buy from a producer; but it is no offence for him to buy unless he himself is a consumer, and the same observations apply. Whether the omission of the word "consumer" was deliberate or not, I do not know, but if it was, I think it fails in its object, because I cannot see any offence of the nature that is charged in these two cases. For the reasons given by Lord Goddard C.J., with which I entirely agree, I think it is almost absurd to say that a person who buys eggs for the purpose of hatching is buying them for the purpose of consuming them and is, therefore, a consumer of those eggs. I also desire to associate myself in full with the observations made by Lord Goddard C.J. as to the necessity for clarity in orders which create criminal offences.

Appeals dismissed.

Solicitor for the appellant : *Treasury Solicitor.*

Solicitors for the respondents : *Walker, Charlesworth & Jefferson.*

H. A. P.

HORDERN-RICHMOND, LIMITED v. DUNCAN.

Limitation—Motor car—Collision—Injury to passengers—Driver of one vehicle acting in execution of public duty—Claim by owner of other vehicle for declaration of right to indemnity or contribution—Writ issued within one year of accident—No action brought by passengers—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30), s. 6, sub-s. 1 (c)—Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 21, sub-s. 1.

On November 2, 1944, the plaintiffs' lorry came into collision with an army lorry driven by the defendant and as a result four

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soldiers travelling in the army lorry were injured. No proceedings had been begun by any of the four soldiers against either the plaintiffs or the defendant in respect of their injuries, but within a year of the accident the plaintiffs issued a writ against the defendant claiming a declaration that they were entitled to indemnity and/or contribution under s. 6, sub-s. 1 (c), of the Law Reform (Married Women and Tortfeasors) Act, 1935, in respect of any such claim which might be made. The plaintiffs contended that unless they obtained such a declaration they might suffer an injustice since, if they were subsequently found liable in damages to any of the four soldiers, their claim for indemnity or contribution against the defendant might be barred by s. 21, sub-s. 1, of the Limitation Act, 1939 :—

Held, that the declaration ought to be granted.

Merlihan v. A. C. Pope, Ltd. [1946] K. B. 166, discussed and doubted.

ACTION.

On November 2, 1944, the plaintiffs' motor lorry came into collision with an army lorry driven by the defendant, who was a sergeant in the army. As a result of the collision four soldiers who were travelling in the army lorry were injured, but up to the date of the hearing of the present action none of them had made any direct claim or commenced any proceedings against either the plaintiffs or the defendant in respect of the accident. Nevertheless the plaintiffs, fearing that a claim might be made against them and that if they were found liable they might, as a result of the decision in *Merlihan v. A. C. Pope, Ltd.* (1), be prevented by reason of s. 21, sub-s. 1, of the Limitation Act, 1939 (2), from recovering indemnity or contribution from the defendant under s. 6, sub-s. 1 (c), of the Law Reform (Married Women and Tortfeasors) Act, 1935 (3), issued a writ against the defendant within one year of the date of the accident claiming

(1) [1946] K. B. 166.

(2) Limitation Act, 1939, s. 21, sub-s. 1: "No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued."

(3) Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, sub-s. 1: "Where damage is suffered by any person as a result of a tort . . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise"

a declaration that they were entitled to indemnity and/or contribution in respect of any claim made against them arising out of the accident. The form of the declaration was subsequently amended in the course of the hearing and is set out in the judgment of Cassels J.

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Serjeant Sullivan K.C. and *O'Connor* for the plaintiffs. The plaintiffs should be entitled to protection under s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, in case they are made liable for damages in respect of the accident. The question is when the cause of action arises. "Cause of action" is not defined in the Act, but it is submitted that it arises when conditions exist which, if true, would justify an action being brought. In *Merlihan v. A. C. Pope, Ltd.* (1) Birkett J. held that the cause of action against a third party accrued on the date of the accident. The result of that decision is that where a public authority would be involved as third party a person may be deprived of the benefit of the statute unless he can get a declaration within twelve months of the accident.

[CASSELS J. How would a declaration prevent the defendant from setting up the Statute of Limitations as a defence if he were brought in as a third party and sued for contribution after twelve months?] A declaration of a right is a preservation of that right. The defendant would not be able to plead the Statute of Limitations because an action would have been brought against him within twelve months in respect of the accident, albeit it was an action for a declaration. The court has unlimited jurisdiction under Or. 55, r. 1, to make declarations and the court ought to make a declaration in the present case.

John Foster for the defendant. The court cannot grant a declaration such as is asked for by the plaintiffs. The issue of who was responsible for the accident does not arise in the present proceedings and the court has no jurisdiction to try that issue. There is therefore no triable issue in respect of which a declaration can be granted, and a declaration will not be made unless there is a triable issue before the court. [Counsel referred to *Thomas v. Moore* (2).] If there were a triable issue, then the court would have to decide whether the plaintiff or the defendant were liable or both. If the court held that the plaintiff was not liable, then there could be no declaration of right to indemnity or contribution. If the plaintiff were

(1) [1946] K. B. 166.

(2) [1918] 1 K. B. 555.

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found solely to blame, then likewise there could be no declaration against the defendant. It would therefore be essential for the plaintiffs to prove that they were partly to blame for the accident to entitle them to a declaration. The principles on which declarations are granted are illustrated by *Carpenter v. Ebblewhite* (1) and *In re Clay* (2). A declaration must be a declaration of existing rights. If a declaration were granted in the present case the result would be to fetter the trial judge in any future action arising out of the accident. No claim has yet been made against the plaintiffs, much less has their liability been determined.

Even if a declaration were made as asked by the plaintiffs, the fact that they had asked for it within one year of the accident could not change the law with respect to limitation of actions or lead to the extinction of a statutory right. There may be some injustice, but it should not be exaggerated. The plaintiffs are merely put in the position in which they would have been before 1935 when the Law Reform (Married Women and Tortfeasors) Act was passed.

The declaration asked for should therefore be refused.

O'Connor replied.

CASSELS J. I take the view that what I have to decide in this court is: Is there a triable issue between the parties to these proceedings? I have come to the conclusion that in the circumstances, without deciding who is right and who is wrong, or who is liable and who is not, there is undoubtedly a triable issue which has, in fact, been set up both by the plaintiff and by the defendant, because the plaintiff says that the defendant was to blame for this accident, and the defendant says that the plaintiff was to blame, and the question arises whether the plaintiff is entitled to an indemnity or contribution as against the defendant.

These proceedings are brought for a declaration in the following terms: "That in the event of any proceedings for "damages being instituted against these plaintiffs their "servants or agents in respect of the accident mentioned in "the pleadings in this action they shall be entitled to claim "indemnity or contribution against the present defendant "pursuant to s. 6 of the Law Reform (Married Women and "Tortfeasors) Act, 1935, in respect of any damages or costs "that may be awarded against them." The date of the

(1) [1939] 1 K. B. 347.

(2) [1919] 1 Ch. 66.

accident was November 2, 1944. To-day is January 29, 1947. Up till this moment, so far as the court is informed, not one of the four injured soldiers in the defendant's lorry has started proceedings against either the plaintiffs or the defendant. There has been a suggestion that proceedings might be brought, because it is said that somebody connected with the Claims Commission Department of the War Office has, in respect of this accident, made a communication to an individual who happens to have been in the plaintiffs' lorry at the time of the accident. Whether that evidence was admissible or not, the broad fact remains that up to this moment no action has been started. The plaintiffs say, and there is a good deal of force in it: "We are ordinary citizens. The person whose negligence was, we say, either entirely or partly responsible for causing this accident is entitled to call himself a public authority, because he was engaged upon public duty at the time and was a public servant, for indeed he was a soldier in the Army. If an action is brought against us by any of the soldiers in respect of the accident, we want to be in a position to bring in the defendant as a third party, so that in the event of our being found liable we can claim under the Law Reform (Married Women and Tortfeasors) Act, 1935, indemnity or contribution in third-party proceedings, which, of course, we cannot start until a writ is issued against us and then only with leave. What we want is a declaration that we shall be entitled to start them, notwithstanding the fact that the proposed third party would be able to claim protection under the Limitation Act." It is said that there would be a grave injustice to an ordinary citizen, possibly liable in damages for negligence to a plaintiff, if the circumstances should show that there is another party who may also be liable in respect of the particular accident which gives rise to the action, but who happens to be a public authority entitled to claim the protection of the Limitation Act, 1939, because, by delaying the institution of his proceedings for more than twelve months, the plaintiff may put it out of the power of the defendant to bring in the other party and render him liable to make contribution or pay an indemnity.

In *Merlihan v. A. C. Pope, Ltd., Pagnello (Third Party)* (1), a similar set of circumstances seems to have arisen. The defendant in that case found himself unable to start third party proceedings against the third party within the twelve

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months, and the third party took advantage of the Act, as he was entitled to do, and his contention prevailed. Birkett J., having in the course of that case found that the third party, Pagnello, equally with the defendants' driver was guilty of negligence contributing to the collision, went on to say (1) : " The important matter which was relied on by counsel for the third party is rather a difficult question of procedure at law. " In answer to the claim for contribution made by the defendants, the third party argues that he is not liable by reason " of s. 21 of the Limitation Act, 1939." The learned judge then proceeded to show that the dates were all in favour of that contention, and referred to s. 6, sub-s. 1, of the Law Reform (Married Women and Tortfeasors) Act, 1935. In giving his construction of that sub-section, Birkett J. said (2) : " The " point is a new one ; it has never been determined, and no " real guidance on it exists. On behalf of the third party it is " contended that he is not liable to the plaintiff because of the " Limitation Act, 1939, and, that in order to make the words " in para. (c) of the Law Reform (Married Women and Tort- " feasers) Act, 1935, applicable to this case, the words ' who is, " ' or if sued " in time," would have been liable ' must be " substituted. It is clear that Pagnello was not sued in " time. His liability arises because of his negligence on " March 15, 1943. That was the date on which he became a " tortfeasor, and, so far as the plaintiff is concerned, the cause " of action, as is not disputed, arose on that date. It was " argued for the defendants, several cases being cited which " do not call for discussion, that so far as concerns them, " as against the third party, the date of the accident, March 15, " 1943, is irrelevant ; and that while that may be the date of " the cause of action as between the plaintiff and the third " party, the date of the cause of action as between the defen- " dants and the third party must be taken to have been June 14, " 1945, because that was the first date on which they became " liable, by the finding of the court against them, for the damage " suffered by the plaintiff. They say, therefore, that the " Limitation Act, 1939, has no application. The conclusion " to which I have come is that it is not competent for the " defendants to claim contribution from the third party. " I so hold on the express ground that the third party is pro- " tected by the Limitation Act, 1939, because the cause of " action in fact accrued on March 15, 1943. The Law Reform

(1) [1946] K. B. 169. (2) Ibid. 170.

" (Married Women and Tortfeasors) Act, 1935, certainly made a great change in the law and, apparently, this particular difficulty was not foreseen. In my opinion, it would not be a proper interpretation of s. 6, sub-s. 1 (c), to read it as if the material words were 'who if sued in time would have been liable.' There will be judgment for the third party against the defendants with costs." It is by reason of that case that the plaintiffs in the present action seek a declaration that, having started these proceedings within twelve months of the accident, their rights are preserved and that if an action should be brought against them they will be entitled to bring their third-party proceedings against the defendant, and to deprive him of any protection which he might otherwise have under the Limitation Act, 1939.

A plaintiff in a negligence case may bring an action against one defendant, or he may bring an action against two defendants. If he brings his action against two defendants, each defendant is entitled to any defence which may be available. A plaintiff may obtain judgment against both defendants. He may obtain judgment against one defendant only, and the second defendant may obtain judgment against him for his costs. That is one set of proceedings. Another set of proceedings which may be available to a plaintiff who is claiming damages for negligence is for him to bring an action against one defendant. That defendant is entitled by what is known as third-party procedure, upon leave being granted to him by the court, to bring in somebody else, not as a second defendant, but as a third party, in order that if he, the defendant, should turn out to be liable to the plaintiff he may pass on all or some of that liability to the third party by claiming from that third party an indemnity or contribution. That proceeding is made possible by s. 39 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides for third-party procedure. Sub-section 2 of that section says: "Every person served with any such notice as aforesaid"—that is to say, notice of being made a third party—"shall thenceforth be deemed a party to the cause or matter with the same rights in respect of his defence against the claim"—that is the claim of the defendant against him as third party—"as if he had been duly sued in the ordinary way by the defendant." The words "by the defendant" will be observed. One has to bear in mind that third-party proceedings are proceedings in the nature of a separate action brought by a defendant against

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a third party, in which the cause of action is by no means necessarily the same as the cause of action which brings the plaintiff and the defendant before the court. The cause of action which brings a plaintiff and a defendant before the court in such a case as may arise out of this accident is negligence. The cause of action which entitles a defendant to bring a third party before the court is the liability of the third party to make contribution or to pay an indemnity. That cause of action has not arisen until the liability of the defendant has been ascertained. Under s. 39 of the Act of 1925 and the Orders and Rules of the Supreme Court governing third-party proceedings, notice of them is given to a third party before liability is established. It is one of the peculiarities of that procedure which enables this to take place before there is any liability. But the plaintiff can never get a judgment against the third party; it is only the defendant who gets a judgment against the third party. Neither, in such proceedings, could the defendant succeed and yet leave the plaintiff with judgment against the third party. It is only on the defendant being made liable that the defendant has any cause of action against the third party. Whatever for convenience of procedure may be the order for directions for the trial, however the witnesses may be called and heard, or whether the proceedings by the plaintiff against the defendant are tried at the same time as the proceedings by the defendant against the third party matters not. The position is quite clear. The proceedings by the defendant against the third party are independent of and separate from the proceedings by the plaintiff against the defendant, except that, when the defendant is made liable to the plaintiff, he then has his right open against the third party to establish, if he can, that he possesses a right to indemnity and contribution from that third party.

My attention has been drawn to several cases in which declarations have been applied for, and in some instances granted and in others refused; but I think that this declaration, which it is part of the equity jurisdiction of the court to grant, is a matter for the discretion of the court in the peculiar circumstances of the case before the court. It is not for me to inquire into what the effect of the declaration may be, or whether it is going to be useful to the person who gets it or not; but, being asked to make this declaration, I have to inquire into the circumstances. I have listened to a very full argument upon the point. If it had not been for the decision

of Birkett J., it may well be that no such application would have been made. I find it difficult to say that I should have arrived at the same conclusion as Birkett J. arrived at upon the same facts. I take the view that the Limitation Act only starts to run in favour of a third party in such circumstances as these when the defendant has been made liable for the damages. Whether the judge who tries this case, if it ever should be brought to trial, will subscribe to the decision of Birkett J. or will say that the point does not prevail in favour of the third party, I do not know; but it seems to me that, unless the legislature interferes, this position is bound to be faced in any case arising out of negligence where a plaintiff forbears to sue one of the parties responsible for more than twelve months and the other party alleged to be responsible is entitled to the protection of the Limitation Act. That gives rise to such an obstruction to justice being done that, if the remedy sought by the plaintiffs in the present case is calculated to meet the situation, it seems to me that it ought to be granted. In those circumstances, I grant this declaration in the terms set out in the statement of claim as amended. Then, if this decision of this court remains, the matter will be at any rate available for ventilation before the judge who does try the subsequent case, and the plaintiffs here will be able to say: "Within the twelve months and before the operation of the "Limitation Act"—if it is to date from the happening of the accident, which I doubt very much—"we have brought you "before the court in respect of this particular accident, so "as to be ready in case the injured persons start an action, "and with this declaration in our pockets we can meet your "proposed defence that you are protected by the statute and "say that you are not, because a court in full possession of the "facts has declared that we were entitled to bring you in."

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Judgment for plaintiffs.

Solicitors for plaintiffs: *White & Co.*

Solicitor for defendant: *Treasury Solicitor.*

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Approved and Applied. HARLING v.
EDDY. [1951] 2 All E.R. 212.
1950 2 KB 739

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Dec. 10, 11,
18.

Sale of goods—Sale by auction—Conditions of sale excluding liability for misdescription—Article not complying with description in sale catalogue—Oral confirmation of description by vendor and auctioneer—Liability of vendor for breach of warranty.

Scott,
Tucker and
Bucknill L.JJ.

The plaintiff purchased at an auction sale a heifer belonging to the defendant which was described in the sale catalogue as "unserved." The catalogue stated that the sale would be subject to the auctioneers' usual conditions and that all lots must be taken subject to all faults or errors of description; and the conditions of sale, which were exhibited at the auction, stated that the lots were sold "with all faults, imperfections and errors of description." At the sale the plaintiff asked both the defendant and the auctioneer whether they could confirm that the heifer in question was unserved and received from both the answer "Yes." Later the heifer was found to be in calf and died as a result of carrying a calf at too young an age. In an action in the county court for damages for breach of warranty the county court judge held that the value of the confirmation by the defendant and the auctioneer that the heifer was unserved was destroyed by the conditions of sale and gave judgment for the defendant. On appeal:—

Held, that in the circumstances the answers of the defendant and the auctioneer to the plaintiff's question amounted to an offer of a warranty overriding the conditions of sale; that such offer was accepted by the plaintiff's bid for the heifer; and that the description amounted to a condition on the breach of which the plaintiff was entitled to treat it as a warranty and recover damages.

Per Scott L.J. Every item in a description which constitutes a substantial ingredient in the identity of the thing sold is a condition.

APPEAL from Wincanton county court.

On December 15, 1945, the plaintiff, a farmer, purchased at an auction sale a heifer, the property of the defendant, for 29*l*. The heifer was described in the sale catalogue as a red and white Stirk heifer, "unserved." In the same document it was stated: "Note. The sale will be subject to the auctioneers' usual conditions, copies of which will be exhibited. The auctioneers will not be responsible for any error or misstatement in this catalogue, or in the dates of calving of any cattle. The information contained herein is supplied by the vendor and is believed to be correct, but its accuracy is not guaranteed, and all lots must be taken subject to all faults or errors of description (if any), and no compensation will be paid for the same." The conditions of sale, which were

exhibited at the auction, contained the following condition :
 " The lots are sold with all faults, imperfections and errors of
 " description, the auctioneers not being responsible for the
 " correct description, genuineness, or authenticity of, or any
 " fault or defect in any lot, and giving no warranty whatever."
 The plaintiff gave evidence that he required an unserved heifer
 for service by his own bull, and that at the sale he asked both
 the defendant and the auctioneer whether they could confirm
 that the heifer in question was unserved and received from both
 the answer " Yes." He thereupon bid for the heifer and it was
 knocked down to him. Later the heifer was found to be in
 calf and on February 26, 1946, she died as a result of the strain
 of carrying a calf at too young an age.

The plaintiff brought an action against the defendant in the
 county court claiming damages for breach of warranty. There
 was no suggestion that either the auctioneer or the vendor did
 not honestly believe that the heifer was unserved. The county
 court judge accepted the plaintiff's evidence as to the confirm-
 ation by the defendant and the auctioneer of the description of
 the heifer as unserved, but he held that the value of such con-
 firmation was destroyed by the conditions of sale and gave
 judgment for the defendant.

The plaintiff appealed.

Dare for the plaintiff. The statements of the vendor and the
 auctioneer confirming that the heifer was unserved amounted
 to an express oral warranty which prevent the qualifying stipu-
 lations in the catalogue and in the conditions of sale from
 applying to this sale. The county court judge held that not-
 withstanding such warranty the plaintiff could not recover
 because of *Ward v. Hobbs* (1). But that case is distinguishable.
 The principle applicable to the present case is stated in
Bannerman v. White (2), where it was held that on a sale of
 hops a representation that no sulphur had been used in their
 cultivation amounted to a condition and that the buyer was
 entitled to repudiate the contract. *Harrison v. Knowles &*
Foster (3), where a statement as to the dead weight of two ships
 was held not to be part of the contract, does not apply. In the
 present case the qualifying stipulation in the catalogue only
 applies to what was to be found in the catalogue. Moreover,
 it does not do more than protect the auctioneer and does not

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(1) (1878) 4 App. Cas. 13.

(3) [1918] 1 K. B. 608.

(2) (1861) 10 C. B. (N. S.) 844.

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exempt the vendor from liability. The warranty given here amounts to a condition (see per Channell J. in *Varley v. Whipp* (1) and *Wallis Sons & Wells v. Pratt & Haynes* (2)) and the terms of the catalogue and of the conditions of sale only govern warranties and do not apply to conditions. For those reasons the county court judge was wrong in holding that the plaintiff could not recover damages for breach of warranty.

Fay for the respondent. The statement that the heifer was unserved must be treated as either a condition or a warranty or a mere representation of fact not being a term of the contract. In *Heilbut, Symons & Co. v. Buckleton* (3) Lord Moulton said that an innocent misrepresentation would not be held to amount to a warranty unless intended by the parties to be so at the time of sale. Here there is no evidence that it was intended to be a warranty. Even if it was, then it was a warranty and not a condition. In *Harrison v. Knowles* Bailhache J. said (4): "where the subject-matter of a contract of sale is a specific existing chattel a statement as to some quality possessed by "or attaching to such chattel is a warranty, and not a condition, "unless the absence of such quality or the possession of it to a "smaller extent makes the thing sold different in kind from "the thing as described in the contract." In the present case the heifer was different in degree, but not different in kind. This was not a sale by description, but a sale of a specific animal which could be inspected. Warranties were expressly excluded by the printed conditions of sale. In any case, there was an error of description within the meaning of those conditions. [He referred to *Taylor v. Bullen* (5).] The oral confirmation was a mere repetition of the vendor's honest belief not intended to form part of the contract. There is no evidence that the parties agreed to dispense with the stipulation in the catalogue. This appeal ought therefore to be dismissed.

Dare in reply.

Cur. adv. vult.

Dec. 18. SCOTT L.J. read the following judgment. It is a striking feature of county court appeals that they so often present features of great interest, whether of law or of practical importance to the community, and also raise quite difficult

(1) [1900] 1 Q. B. 513, 515.

(2) [1911] A. C. 394.

(3) [1913] A. C. 30, 49.

(4) [1917] 2 K. B. 606, 610.

(5) (1850) 5 Exch. 779.

problems for solution by the court. The present appeal presents all three features. There can be no question on the facts found by the county court judge but that, in the absence of some special agreement to the contrary, when the hammer fell the resulting contract was subject to the printed conditions of sale exhibited at the auction and to the stipulations contained in the sale catalogue. So far it is in my opinion clear that the plaintiff, by reason of those conditions and stipulations, would have no remedy by way of damages for breach of contract or warranty against the defendant unless the plaintiff is right in his contention that the language of these documents is effective only to protect the auctioneer from personal liability and affords no defence to the vendor in respect of any misstatements in the catalogue for which he would otherwise be liable. It is no doubt true that some of the printed conditions of sale deal only with the position of the auctioneer, and that the first part of the note in the catalogue is to the same effect, but it is in my view impossible to say that the words "the lots are sold with all faults, imperfections and errors of description" and the words "and all lots must be taken subject to all faults or errors of description (if any) and no compensation will be paid for the same" are not to be incorporated as terms of the contract as between the vendor and purchaser when the hammer falls. Whether the word "unserved" amounts to a warranty or a condition is immaterial because it is, I think, clear that it was in any event an error of description and as such expressly protected by the words to which I have referred. For these reasons it appears to me that in so far as the plaintiff relied on the statement in the catalogue to support his claim for damages for breach of warranty, he necessarily failed.

The plaintiff, however, also claimed by further particulars as follows: "The said warranty was also confirmed verbally both by the auctioneer (Mr. Richards) and by the defendant upon inquiry by the plaintiff prior to the sale." As to this the county court judge has accepted the plaintiff's evidence, which was to the effect that at the sale, and when the heifers were in the ring, he asked both the defendant and the auctioneer: "Can you confirm heifers unserved?" and received from both the answer "Yes." There was no contract at that moment. There was an announcement of an auction of specific chattels. It was to the effect, first, that the auctioneer was about to make auction offers of the things and animals in the catalogue on

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behalf of the vendor to the public attending the auction on the terms of sale contained in the two documents, viz.: the catalogue and the printed advertisement of the terms of sale hung up at the auction; secondly, that the vendor had given authority to the auctioneer to sell the chattels by auction in those terms. There was no contract in existence until the hammer fell: the offer was defined, the auctioneer's authority was defined, but it was in law open to any would-be purchaser to intimate in advance before bidding for any particular heifer offered from the rostrum that he was not willing to bid for the lot, unless the vendor modified the terms of sale contained in the two documents in some way specified by him. There is no doubt that the plaintiff did make some attempt of the kind in order to protect himself from the risk of buying an animal that was not of the kind described. The real question is, what did the parties understand by the question addressed to and the answer received from both vendor and auctioneer. It is contended by the defendant that the question meant: "having regard to the onerous stipulations which I know I shall have to put up with if I bid and the lot is knocked down to me, can you give me your honourable assurance that the heifers have in fact not been served? If so, I will risk the penalties of the catalogue." The alternative meaning is: "I am frightened of contracting on your published terms, but I will bid if you will tell me by word of mouth that you accept full responsibility for the statement in the catalogue that the heifers have not been served, or, in other words, give me a clean warranty. That is the only condition on which I will bid." If that was the meaning there was clearly an oral offer of a warranty which overrode the stultifying condition in the printed terms: that offer was accepted by the plaintiff when he bid, and the contract was made on that basis when the lot was knocked down to him. In some circumstances I concede that such a question might, on its face, be somewhat ambiguous, but I think in the present case the only inference that could properly be drawn by the judge or jury charged with the duty of finding the facts—and this is a question of fact as to the intention of the parties—is that the question was asked and answered with the alternative meaning indicated above. That this is so follows, I think, conclusively from the plaintiff's evidence which was accepted by the judge, taken in conjunction with the admissions of both defendants that the words if used—which they denied—would have bound them. It is obvious

that it was the stipulations that prompted the question. The plaintiff was not a lawyer, but he knew what he wanted, and he got it : so did the vendor, and he gave it. What the plaintiff wanted was to know where he stood before he made an offer which the fall of the hammer would turn into a contract.

The county court judge in a careful reserved judgment has found that this oral statement was made, and he refers to it as a warranty but holds that its value was destroyed by the qualifying stipulations. He has not in terms put the question to himself : " Did the parties by this question and answer intend " to exclude the stipulations from the contract that resulted " on the fall of the hammer ? " I have accordingly felt some doubt whether or not the proper course was to order a new trial. On reading his judgment as a whole I have, however, arrived at the conclusion that there is in it an implicit finding that it was not the intention of the parties to exclude the stipulation. Being of opinion that on the facts found by him he could not properly arrive at this conclusion, I think we are not compelled to put the parties to the expense of a further trial.

There was a good deal of discussion as to whether the description " unserved " constituted a warranty or a condition. I have, in what I have said so far, deliberately refrained from expressing a view thereon, but as a matter of law, I think every item in a description which constitutes a substantial ingredient in the " identity " of the thing sold is a condition, although every such condition can be waived by the purchaser, who thereupon becomes entitled to treat it as a warranty and recover damages. I think there was here an unqualified oral condition, the breach of which the plaintiff was entitled to treat as a breach of warranty and recover the damages claimed.

One final word. The printed condition that the vendor will take no responsibility for errors of description of things or animals specifically offered for sale on inspection is reasonable for visible defects, but for qualities or attributes which are invisible it is not reasonable. It may well become a mere trap for the unwary. The point deserves consideration by the auctioneers associations. The appeal should, therefore, in my opinion, be allowed.

TUCKER L.J. I have had the advantage of reading the

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C. A. judgment of Scott L.J. before it was delivered, and I agree that the appeal succeeds for the reasons he has stated.

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BUCKNILL L.J. I agree.

Appeal allowed (1).

Solicitors for the appellant: *Roche, Son & Neale, for Cecil Forward, Axminster.*

Solicitors for the respondent: *Butt & Bowyer, for Rutter & Rutter, Wincanton.*

(1) Since bidders at an auction have a right to suppose that they are all bidding on equal terms, it is a very grave question whether a private bargain for a warranty, when it is publicly announced that the sale is without warranty,

could, if its legality were challenged, be upheld in a court of justice: see *Hopkins v. Tanqueray* (1854) 15 C. B. 130. That question was not raised in this case, and therefore remains open.—Ed.

H. A. P.

C. C. A.

REX v. COLLINS.

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Jan. 14.

Lord Goddard
C.J.,
Humphreys and
Lewis JJ.

Criminal law—Sentence—Taking other offences into consideration—Offences under Road Traffic Act, 1930, involving disqualification for driving or endorsement of licence.

Offences under the Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), which involve disqualification for driving or the endorsement of the licence, are not proper cases to be taken into consideration when sentencing a person convicted of another class of offence.

APPLICATION for leave to appeal against conviction.

The applicant was convicted at the Central Criminal Court on two charges of receiving stolen property and was sentenced to three years penal servitude. At the trial, after the applicant's conviction and before sentence, the police informed the Recorder that there was a warrant out against the applicant for driving a motor car while under the influence of drink. The Recorder asked the applicant if he desired that that matter should be taken into consideration in passing sentence and the applicant said that he did. The Recorder thereupon stated that he would take it into consideration.

The applicant applied for leave to appeal against his conviction.

LORD GODDARD C.J. In respect of both charges this case was about as clearly proved as any case could possibly be and there is nothing whatever to be said. But one matter has arisen on which it is desirable to say something and of which the court hopes that notice will be taken. After the applicant was convicted, the police informed the Recorder that there was a warrant out against the applicant for driving a motor car while under the influence of drink. No doubt it was quite proper for the police to tell the Recorder that, but the Recorder then asked the applicant if he desired that the matter should be taken into consideration. The applicant said that he did, and the Recorder said that he would take it into consideration. In the opinion of the court, offences against the Road Traffic Act, 1930, which on conviction may involve disqualification for driving or the endorsement of the licence are not proper cases to take into account when sentencing a prisoner for another class of offence altogether, although no doubt if a man were charged on indictment with an offence under the Road Traffic Act, 1930, for which he was liable to be disqualified for driving, and there were a second charge against him, the court might take that into account. The reason is that unless there is a conviction for an offence for which the prisoner is liable to be disqualified for holding a licence, such as driving under the influence of drink or driving a car when uninsured, there is no power to disqualify him, and Parliament has ordained that in those cases, unless special circumstances exist, the prisoner must be disqualified. Similarly, in certain other cases, the licence must be endorsed. In the particular case before this court no harm may have been done, because the applicant received a sentence of three years penal servitude. None the less, if the case had been inquired into, the court might have considered a period of disqualification for five or ten years appropriate, or, if the man had been convicted two or three times before, the court might have imposed a disqualification for life. But if, as might happen on conviction for a minor offence, a sentence of six months imprisonment were passed, it would be most unsatisfactory, because the period of disqualification must be for at least a year. So this court lays it down that for the future offences under the Road Traffic Act, 1930, for which disqualification for driving or the endorsement of the licence can be imposed are not proper cases to take into consideration when passing sentence for other types of offences.

C. C. A.

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Jan. 15;
Feb. 16.

Denning J.

WEDDERSPOON *v.* MINISTER OF PENSIONS.

Pensions—Death of officer on service—Naval surgeon—Overdose of sleeping draft—Dose self-administered—Weak heart—Death not attributable to war service.

The widow of a Surgeon Lieutenant in the Royal Naval Volunteer Reserve claimed a pension in respect of the death of her husband who died on board his ship as a result of administering to himself an overdose of chloral hydrate. The deceased officer suffered from sleeplessness and took the drug as a sleeping draft. A post mortem examination revealed that he also suffered from a weak heart and it was considered that his death was caused by the overdose of the drug placing a strain on his heart which it was unable to bear :—

Held, that the cause of the deceased officer's death was the taking by him of an overdose of the drug ; that his sleeplessness and weak heart were not causes of his death but only the circumstances in which the cause operated ; and that, since the drug was taken by him in his personal capacity, his death was not attributable to war service.

Minister of Pensions v. Chennell ante p. 250 applied.

APPEAL from a Pensions Appeal Tribunal.

The appellant was the widow of Surgeon-Lieutenant Wedderspoon R.N.V.R., who died while on service in his ship on June 5, 1945. At the hearing before the tribunal evidence was given that on the evening before his death the deceased dined on board and afterwards played bridge. About 12.30 a.m. he went to the sick bay where he asked the leading sick bay attendant where the chloral hydrate was kept. Having been told, he put some of the crystals into a medicine glass without measuring them and administered to himself the dose. On the following morning he was found dead. The leading sick bay attendant stated that he had worked with the deceased officer for eighteen months and that he had known him to dose himself with chloral hydrate three times before in a period of five months. A post mortem examination revealed that the deceased suffered from a weak heart and that there were nearly ten grains of chloral hydrate in the stomach. At an inquiry it was found that the self-administered dose was excessive, causing asphyxiation and placing a strain on the heart which it was unable to bear.

The medical services division of the Ministry of Pensions were of opinion that the death of the deceased was due to misadventure unconnected with war service and a pension was

accordingly refused. An appeal to a Pensions Appeal Tribunal was disallowed on July 18, 1946, but the tribunal, at the appellant's request, stated a case for the opinion of the High Court.

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Crispin for the appellant. The death of the appellant's husband was attributable to his service since it occurred in the course of that service. He took the drug because of his sleeplessness, which was caused by the conditions of his service. The drug might not have harmed an ordinary man, but acting on his weak heart, which he did not know that he had, it was fatal.

Stephen Chapman for the Minister. The cause of the death of the deceased was his own act. It was not a matter of mere negligence. He deliberately administered to himself an unmeasured quantity of the drug. Such an act could not be said to be attributable to his service.

Cur. adv. vult.

Feb. 17. DENNING J. The tribunal say, in the case stated, that they were satisfied beyond reasonable doubt that the deceased officer had administered to himself an overdose of chloral hydrate and that his death would not have been caused or hastened if he had not administered to himself such dose. The question for determination is one of causation. Applying the test which I enunciated in *Minister of Pensions v. Chennell* (1), I am of opinion that the cause of this officer's death was the taking by him of a dose of choral hydrate without measuring it out and without advice. His weak heart and his sleeplessness were not causes of his death, but only the circumstances in which the cause operated. They were factors in the situation, but factors which fell short of being causes. It is said that if the doctor had carelessly administered the overdose to one of the ship's company and not to himself, the death of the man would have been attributable to war service. That is true, but this case is different. The dose was taken by Lieutenant Wedderspoon in his personal capacity. It is not a case of a ship's doctor prescribing for himself, but the case of a man, who happened to be a doctor, taking too large a sleeping draught in his personal capacity. The consequences of such an action are no more attributable to war service than the consequences of drinking too much or smoking too much or playing a game of squash. The cases show that when the cause

(1) Ante p. 250.

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of the death or disablement lies in the man's own personal or domestic sphere, and the war service does no more than provide the circumstances in which the cause operated, it is not attributable to war service. The appeal is, therefore, dismissed.

Appeal dismissed.

Solicitors for appellant : *Wainwright & Pollock, O'Brien—Taylor & Co.*

Solicitor for the Minister : *Treasury Solicitor.*

H. A. P.

1947
 Jan. 23.
 Denning J.

EDWARDS v. THE MINISTER OF PENSIONS.

Pension—Member of military forces—Disability—Medical examination on attestation before September 3, 1939—No note of injury or disease—No subsequent examination on commencement of war service—Compelling presumption in favour of applicant—Royal Warrant, 1943, art. 4 (3.).

The compelling presumption under art. 4 (3.) of the Royal Warrant, 1943, in favour of an applicant for a pension where the injury or disease which led to his death or discharge during war service was not noted on a medical report made on the commencement of his war service, applies to members of the Territorial army and regular forces who were medically examined on enlistment before September 3, 1939, and were not subsequently examined on the commencement of their war service, as well as to those who were examined on joining the forces on or after September 3, 1939.

Brown and Others v. Minister of Pensions 1946 S. C. 471, not followed.

CASE STATED by a chairman of a Pensions Appeal Tribunal under s. 6 of the Pensions Appeal Tribunals Act, 1943.

The appellant, James Edwards, enlisted as a member of the Territorial army on April 4, 1939, and was medically examined on that date and placed in category A. He was embodied on September 2, 1939, and no further clinical examination of him was made at that time. He served in France and north-west Europe until June 13, 1945 and remained a member of the military forces until November 24, 1945, when he was discharged as permanently unfit for any form of military service in consequence of epilepsy. A claim for a pension in respect of

his disability was rejected by the Minister of Pensions and he thereupon appealed to a pensions tribunal which dismissed the appeal. They were of opinion that the appellant was not entitled to the compelling presumption in favour of an applicant for a pension given by Art. 4 (3.) of the Royal Warrant, 1943 (1), by reason of the fact that no medical report was made on him on the commencement of his war service and that it had not been established that his disability was attributable to, or aggravated by, war service. The appellant appealed on the ground, inter alia, that he was entitled to the benefit of the compelling presumption in his favour and that the Minister had not discharged the onus laid on him by art. 4 (3.) of the Royal Warrant of 1943 showing that his disability was not attributable to, or aggravated by war service.

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Crispin for the appellant. The decision of the tribunal proceeded on a wrong basis. The appellant was entitled to the compelling presumption in his favour as provided by art. 4 (3.) since the disease which led to his discharge was not noted in a medical report made on him on the commencement of his war service. It is submitted that the provisions of the article apply in the case of a man who was medically examined before the war and passed for general service, in the same way as they do in the case of a man who was examined on September 3, 1939, or later. It has been held by this court on several occasions that this view is correct but in *Brown and Others v. Minister of Pensions* (2) the Court of Session held that the compelling presumption did not apply in a case in which there had been no medical examination on the commencement of war service although there might have been an examination previously on enlistment. It is submitted that the decision of the Court of Session should not be followed.

Stephen Chapman for the Minister of Pensions accepted the view that there was a compelling presumption in favour of the appellant.

DENNING J. stated the facts and continued: The first

- (1) Royal Warrant, 1943, art. 4 (3.): "vice, a certificate under para. (1.)
"Where an injury or disease which "of this article shall be given
"has led to a member's discharge "unless the evidence shows that
"or death during war service was "the conditions set out in that
"not noted in a medical report "paragraph are not fulfilled."
"made on that member on the (2) 1946 S. C. 471.
"commencement of his war ser-

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question that arises is whether there is any compelling presumption in the appellant's favour. The chairman of the tribunal said that in such a case as the present there was no compelling presumption. In so holding he was, no doubt, following the observations made by the Court of Session in *Brown and Others v. Minister of Pensions* (1) where it was said that the compelling presumption under art. 4 (3.) of the Royal Warrant, 1943, is not applicable where there has been no medical examination on the commencement of war service. Although the course the chairman of the tribunal took in the present case is quite understandable, in my judgment his approach to the question was not correct, especially when the man had been examined, as the appellant was in this case, before his war service commenced in September, 1939. It seems to me that it would be a strange thing to hold that because the appellant was not examined in or after September, 1939 he is, therefore, to be deprived of the benefit of the compelling presumption. Many members of the Territorial army or the regular forces or others who enlisted before September 3, 1939, were not examined after that date, and if the decision of the tribunal was right, all these men would lose the benefit of the compelling presumption. It seems to me that if the services accept a man for war service without a medical report, either because he has previously been examined or for some other reason, he still has the benefit of art. 4 (3.). If there was no medical report on the commencement of the man's war service, there was nothing noted in a medical report, and in those circumstances I should have thought that the disease was not noted in a medical report made on the commencement of his war service within the meaning of art. 4 (3.). In the present case the disease from which the appellant suffered was not noted in the medical report made on April 4, 1939, which was the effective medical report; the man was found fit for general service, and that should suffice. Reluctant as I am that there should be any difference between this court and the Court of Session on the point, I feel bound to say that in my judgment the benefit of art. 4 (3.) extends to members of the Territorial Army and the regular forces who were examined before September, 1939, as well as to those who were examined after September 3, 1939, and, indeed, the contrary view has not been contended before me on behalf of the Minister of Pensions. With regard to the facts of the present case, if the tribunal had approached them in the right way,

(1) 1946 S. C. 471.

there might have been no reason for interfering with their decision. The correct approach, however, is important and may be vital and as the chairman of the tribunal appears to have said that this was a case in which there was no compelling presumption and as, in my judgment there was such a presumption, the proper course is to remit the matter to the tribunal so that they can approach it in the light of what I have said.

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Case remitted.

Solicitors for the appellant : *Culross & Trelawny.*

Solicitor for the respondent : *Treasury Solicitor.*

P. B. D.

ained. WESTMINSTER v. SWINTON
[1948] 1 K. B. 524

EYRE AND ANOTHER v. REA.

1947
Feb. 3, 4.

Landlord and tenant—Lease—Covenant not to alter internal planning of premises or underlet any part thereof—Conversion of house into flats—Breach of covenant—Forfeiture—Measure of damages—Landlord and Tenant Act, 1927 (17 & 18 Geo. 5, c. 36), s. 18.

Atkinson J.

The assignee of a lease which contained a covenant not to alter the internal planning of the premises, not to permit the premises to be used otherwise than as a private dwelling-house in one occupation, and not to underlet or part with the possession of any part of the premises, granted sub-leases of parts of the premises to sub-tenants who, by arrangement with him, converted the premises into five separate flats. In an action in which the landlord was granted a decree of forfeiture for breach of covenant, and an order for possession, it was contended for the defendant assignee that the measure of the damages to which the landlord was entitled was only that provided by s. 18 of the Landlord and Tenant Act, 1927, for breach of covenant to keep and put premises in repair.

Held, that the measure of damages provided by s. 18 of the Act of 1927 could not be extended to cover a breach such as had been committed in the present case, and the landlord was entitled to the cost of restoring the premises to their original state, plus the loss of rent during the work of restoration, even though the premises, as flats, were from a financial point of view more valuable than they would be as a single dwelling-house.

ACTION tried by Atkinson J.

Under a lease granted by the plaintiffs, of which the defendant was the assignee, the defendant covenanted not to alter

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the internal planning of the leased premises, not to permit them to be used otherwise than as a private dwelling-house in one occupation, and not to underlet or part with the possession of any part of the premises. By arrangement with the defendant five sub-tenants, to whom he had granted sub-leases, converted the premises into five separate flats. The plaintiffs brought the present action claiming forfeiture of the lease for breach of covenant, a declaration of title to possession, and an order for rent, mesne profits and damages.

The defendant contended that he was entitled to relief against forfeiture under s. 146, sub-s. 2, of the Law of Property Act, 1925; that the measure of damages was that prescribed by s. 18 of the Landlord and Tenant Act, 1927 (1), for breach of contract to repair; and that, in fact, the landlord had suffered no damage because the premises, as converted into flats, were financially more valuable than they would be if restored as a single dwelling-house.

C. L. Henderson K.C. and *O'Malley* for plaintiffs.

H. Heathcote-Williams for defendant.

ATKINSON J., having held that he had no option but to decree forfeiture of the lease and to reject the defendant's claim to relief, continued:—An interesting argument on the question of damages has been addressed to me. The plaintiffs say: "The damages we are entitled to are what it will cost us to put the house back into the condition in which it was. This action is merely based on the conversion, and we are entitled to have the house given back to us in the state in which it was, that is, in single occupation. We are entitled to the cost of the re-converting. Only in that way can justice be done to us. That was the house that we let, that was the house which the defendant assured us he was going to maintain in that condition, that was the house which the covenants provided we should get back at the end of the lease." The

(1) Landlord and Tenant Act, 1927, s. 18: "Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid."

plaintiffs also say : " Apart from what we want and what we are entitled to in that way, we are under a moral obligation to other owners of leases of houses in that road to perform the covenants which we have made them undertake. We may not be legally bound so to do, but we would regard it as a great breach of faith to tolerate one of these houses being maintained as a block of flats when we have made everybody else covenant that he will not do any such thing. That is what we say our right is."

Counsel for the defendant for a time created a doubt in my mind, because he did not draw the distinction between the breach of a covenant of this kind and the breach of a covenant to keep and put premises in repair. He referred to s. 18 of the Landlord and Tenant Act, 1927. He says that the only measure of damages under that breach of covenant to repair is the difference between what would have been the value of the premises if they had been delivered up in a proper state of repair and the value of the premises in the state in which they have been delivered up. There may be cases in which, no one would dream of repairing ; for instance, a case in which a house was almost certainly going to be pulled down at an early date, and in a case of that kind quite a small sum might be found to be due, or, at any rate, the cost of repairs would not be the measure of damages. That was emphasized in *Hanson v. Newman* (1), but again that was a case dealing only with repairs. There a lessee objected to carrying out the covenants of the lease as to painting and repair. It was held that in assessing damages under s. 18 of the Landlord and Tenant Act, 1927, the court had to ascertain the actual value of the property in its unrepaired state at the date of re-entry and the value which the property would then have had if there had been no breach of covenant, and the amount of damage sustained by the landlord is the difference between the two values. On the strength of that counsel argues that the plaintiffs have now got something which, from the financial point of view, is more valuable than the house would have been if it had been in single occupation. They can let it for a higher rent, he says, and therefore they have suffered no damage. I cannot assent to that argument. Section 18 is limited to damages for a breach of covenant to repair. The cases cited to me also dealt merely with covenants to repair. It seems to me that I cannot extend that principle to a breach of a covenant of this sort and

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(1) [1934] Ch. 298.

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say to the plaintiffs: "Despite that covenant and although
 "you let and are entitled to receive back an unconverted house,
 "that is, a house suitable for single occupation, because you
 "have got something which you may be able to let at a higher
 "rent than the house which you are entitled to have back,
 "you have suffered no damage."

The plaintiffs have their rights and I have to measure their rights, so far as they are not modified by some provision in an Act of Parliament. I think that what they are entitled to is the cost of restoring this house to the condition in which they were entitled to have it returned to them, namely, an unconverted house. The cost of that is 896*l.* 12*s.* The evidence is that it will take two to two and a half months to do the work, during which no rent can be earned, and the damage for that will be another 50*l.* Therefore, the order will be that there will be forfeiture of the lease, a declaration that the plaintiffs are entitled to possession, and judgment in their favour for 140*l.* rent, the sum of 194*l.* 16*s.* for mesne profits, and 846*l.* 12*s.* damages for breach of the covenants set out in the statement of claim, and costs.

Solicitors for plaintiffs: *Lee & Pembertons.*

Solicitors for defendant: *J. M. Isaacs & Co.*

A. W. G.

C. A.

KIMBER v. WILLIAM WILLETT, LIMITED.

1947

Feb. 6, 7.

Lord Oaksey,
 Tucker and
 Cohen L.JJ.

Contract—Removal of carpet for cleaning—Loose end of carpet left in unsafe condition—Carpet-cleaners' breach of implied obligation.

The defendants, as experts, undertook to remove for cleaning the plaintiff's dining-room carpet, which was sewn to a strip of the hall carpet extending through the dining-room doorway. In removing the dining-room carpet, the defendants left the end of that strip of hall carpet lying flat but loose. The main body of the hall carpet was tacked to the floor, with the result that the plaintiff, having caught her foot in the loose end while passing from the dining-room, encountered the resistance of the carpet, fell and received injuries, in respect of which she sued the defendants for damages:—

Held, that there was an implied obligation on the defendants, under the contract to clean the dining-room carpet, not to leave behind any hidden danger when they removed it; that they had committed a breach of that obligation by leaving the end of the

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

hall carpet loose ; and that they were accordingly liable to the plaintiff in damages.

Per Tucker L.J. : The obligation on the defendants to be implied was not so wide as that they must do the work in a proper and safe manner so that it should be safe for those in the house to pass to and from the dining-room ; the implied obligation was not more than that the work should be done in a proper and workmanlike manner, which, however, had not been done in fact.

Decision of Henn-Collins J., affirmed.

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APPEAL from Henn-Collins J.

The plaintiff, Mrs. Winnie Grace Kimber, an elderly woman, employed the defendants, William Willett, LD., under an oral contract, to take up and clean the dining-room carpet in her flat in Sloane Court, London. The carpet was near the doorway in the dining-room, attached by sewing to the tongue of the hall carpet which came through the doorway. The rest of the hall carpet was tacked down in the hall, there being ordinary floor boards underneath it. The company's workman cut away the stitches and removed the dining-room carpet, leaving, without tacking it down, the tongue of the hall carpet which protruded through the doorway. Evidence was given that it lay flat in that condition. An Oriental carpet was, on the plaintiff's instructions, put down in the dining room, and lay close against the tongue of the hall carpet.

The plaintiff's case was that it was an implied term of the contract that the work should be done in a workmanlike and safe manner and that, in fact, it was not done in such a manner, the tongue of the hall carpet being left in an unsafe condition. On September 30, 1944, that was, about a fortnight after the dining-room carpet had been taken up, the plaintiff, who had a tray in her hand at the time, caught her foot in the tongue of the hall carpet, fell, and sustained serious injuries.

Henn-Collins J., held that the implied term set up by the plaintiff ought to be implied in such a contract, made between an ordinary householder, who was not an expert in carpet laying, and a firm of expert carpet layers ; that that implied term had been broken ; and that the result of that breach was the damage which the plaintiff had suffered. He accordingly awarded her 500*l.* damages. The company appealed.

Levy K.C. and *T. F. Davis* for the company. *Luxor (Eastbourne), Ltd. v. Cooper* (1) contains the latest and most authoritative [1941] A. C. 108.

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tative definition of an implied contract: see the opinion of Lord Simon (1). No necessity here compels the adoption of an implied term in this contract that the hall carpet should be left nailed down. Admittedly there was an implied term that the company should do the work in a workmanlike manner. [Cohen L.J. Surely it is merely a question of what constitutes compliance with that?] The only undertaking of the company was to take the dining-room carpet up and clean it. For all that they knew, the plaintiff might never have gone into the dining-room at all while its carpet was up. Even if the defendants would have been well-advised to leave the loose edge tacked down, that was not enough to import into the contract an implied term that they should do so. The contract being to take up and clean the dining-room carpet, the question, surely, is whether it was a necessary part of that contract that the hall carpet should be left in a safe condition. It is submitted not, and that the term which the judge has implied into this contract is far too wide. [Lord Oaksey L.J. Is it not significant that the edge in question was in fact sewn to the dining-room carpet before the latter was taken up?] It is submitted not. The only reason for that was that with the passage of years a loose edge of carpet might be expected to curl.

In any event the damage is too remote. [*Hadley v. Baxendale* (2) referred to.]

Vick K.C. and *Edgedale*, for the plaintiff, were not called on to argue.

LORD OAKSEY L.J. This appeal cannot, in my opinion, succeed. The matter is principally one of fact and of appreciation of the evidence, and I see no reason to think that Henn-Collins J.'s judgment was wrong. [His Lordship stated the facts.] Although of some difficulty and nicety, this case is, in my opinion, not one in which the Court of Appeal ought to disturb the finding of the trial judge. I think that his view of the law, namely, that there was the implied term alleged by the plaintiff, was right, and that it was perfectly open to him on the evidence to find that the implied term had been broken. [His Lordship discussed the evidence, and continued:] Accordingly, the company's workman was faced with the problem, after he had cut the sewing, what to do. It seems to me that the reasonably safe thing to do was to tack the carpet down. This hall carpet was not the same as a rug not tacked at

(1) [1941] A. C. 119, 120.

(2) (1854) 9 Ex. 341.

all. It was tacked down all over the hall so that anyone who caught his foot in that part of the hall carpet which protruded through the dining-room doorway would encounter all the resistance of the nailed part of the carpet in the hall. The effect of that would be quite different from catching one's foot in a carpet which was movable because not tacked down. In my opinion, the judge was perfectly at liberty to take that view after hearing the evidence. He was also the best person to judge whether in fact the accident happened in the way in which the plaintiff said that it happened. I am therefore of opinion that the judge's judgment was right on that part of the case.

It was also argued that, there being a breach of contract, the damages here claimed did not flow from that breach, reference being made to *Hadley v. Baxendale* (1). In my opinion, damages such as this may, although they do not necessarily, arise naturally in the usual course of things.

The crux of the whole matter is that the hall carpet had previously been sewn to the dining-room carpet. That of itself is an indication that it was not a safe and satisfactory thing to do to leave the hall carpet loose. I am of opinion that this appeal ought to be dismissed.

TUCKER L.J. I agree that this appeal fails. The plaintiff founded her statement of claim on the breach of an implied term in the contract between the parties, or, alternatively, on negligence. I think that the implied term alleged in the statement of claim is framed too widely. I am, however, quite clearly of opinion that it was an implied term of the contract that the work should be done in a proper and workmanlike manner. I do not quite accept the way in which the judge expressed it in his judgment, but, on the facts, it all comes down to the same result. In my view, the real and only issue is whether the defendant company, on the facts found by the judge, did this work in a proper and workmanlike way. If they left the carpet in a dangerous condition, then I do not think that they did the work in such a way.

In considering whether work of this kind has been done in a proper and workmanlike way it is always material to take into consideration whether the work was being done in an empty or in an occupied house. Here it was being done in a house which,

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to the knowledge of the company, was in use, and in a room which was in use, and adjoining a passage. I think that it would be a clear breach of the obligation to do the work in a proper and workmanlike way if a carpet were left in such a condition that it constituted a danger to anybody using the premises and exercising reasonable care in the course of doing so. In my view, the whole case depends on whether the hall carpet, in the condition in which it was left, did constitute such a danger. With regard to that, I find myself in complete agreement with the trial judge. I am not, by any means, deciding that it is bad workmanship or dangerous always to leave a carpet flat and loose and untacked; but the circumstances of this case were rather peculiar: the carpet in the hall or corridor was tacked, and there was a tongue extending from it into the dining-room, being sewn to the dining-room carpet which had to be removed. When that carpet was removed, it had to be cut away from the tongue of the hall carpet, with the result that there remained a tongue of hall carpet loose, and, admittedly flat, extending some few feet and through the dining-room doorway, and, at its other end, tacked to the floor in the hall. The company's contention was that, that being the condition in which they had left the hall carpet, the Oriental carpet which was put in the dining-room was left in the middle of the room some way away from the tongue. If that had been so I should have been inclined to the view that there was a still greater danger than existed on the facts found by the judge. He found that the Oriental carpet was left up against the tongue of the hall carpet, and not close to it. However that may be, there remained this tongue, which, I think was liable in the course of time to ruck up slightly like any loose carpet walked on, and then to constitute a danger because a person would be liable to get his foot caught under the part which was tacked down. I think that that was not a proper and workmanlike way to carry out this contract; that a danger resulted; and that that danger caused the accident.

The matter is very much one of first impression, but may be tested by the following example: if, as is often the case, there were in the doorway of a drawing-room a mat 2 or 3 ft. long and 18 ins. or 21 ins. wide, and supposing that, the mat being at one end sewn on to the drawing-room carpet and at the other end tacked down, the drawing-room carpet were removed and the sewing cut, but that the tacks were left in at the other end of the mat: can it be suggested that that would not be a

highly dangerous condition? That, in effect, is what happened in this case, except that the tongue of carpet was rather longer than the mat which I have described.

If this was in fact a danger, and, if it was the duty of the defendant company not to leave the hall carpet in a dangerous condition, I find it difficult to see why the damages which in fact flowed from that breach are not recoverable by the plaintiff. It all depends on whether it was the defendant company's duty to do the work in such a way that the carpet was not left in a dangerous condition.

COHEN L.J. I agree.

Appeal dismissed.

Solicitors for the defendant company: *Bulcraig & Davis.*

Solicitors for the plaintiff: *W. C. Crocker.*

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Jan. 27, 28.

Rating—Agricultural cottage—Restrictions on use and on weekly sum recoverable by occupier—Principle of valuation—Agricultural Wages (Regulation) Act, 1924 (14 & 15 Geo. 5, c. 37)—Agricultural Wages (Regulation) Amendment Act, 1940 (3 & 4 Geo. 6, c. 17)—Local Government Act, 1929 (19 & 20 Geo. 5, c. 17), s. 72.

Lawrence,
Tucker and
Cohen L.JJ.

The maximum value at which an agricultural cottage might be reckoned as payment of wages in lieu of cash being prescribed for a certain area by order made under the Agricultural Wages (Regulation) Acts, 1924 and 1940, as 3s. a week, a cottage in that area occupied by a farmer was used as a dwelling by a worker on his farm whose right so to use it was dependent on his being employed by that farmer. On objection by the farmer to a proposed increase in the valuation of the cottage for rating:—

Held, that the gross rateable value of the cottage was not on the true construction of s. 72 of the Local Government Act, 1929 (1),

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

(1) Section 72 of the Local Government Act, 1929: "As from the first day of April, 1930, the gross value for rating purposes of a house occupied in connexion with agricultural land and used as the dwelling-house of a person who—(a) is primarily engaged in

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to be limited by reference to the weekly sum of 3s. which was the most that the farmer could receive for it, by deduction from wages or otherwise, from the worker, since a farmer might be willing to pay a larger sum than 3s. in rent for the cottage in order to secure accommodation for an agricultural worker whom he wished to employ.

Quære whether, under s. 72 of the Act of 1929, the elements to be considered as determining the rateable value of an agricultural cottage without reference to the maximum weekly sum recoverable for it from the worker, do or do not include competition for the cottage among farmers in the neighbourhood.

Decision of the Divisional Court [1946] K. B. 442 affirmed.

APPEAL from the Divisional Court (1).

In the valuation list for the rating area of the rural district of Pershore, Worcestershire, the appellant, James Ferguson Bomford, a farmer, was assessed as the occupier of two cottages, numbers 45 and 46, Salters Lane, Pershore, in the sums of 6*l.* gross and 4*l.* net rateable value in respect of each cottage. On March 23, the first respondents, the rating authority for the rural district of Pershore, made a proposal to amend the valuation list by increasing those gross and net values to 12*l.* and 7*l.* for No. 45 and to 10*l.* and 6*l.* for No. 46. The farmer having given notice of objection to that proposal, the second respondents, the South Worcestershire Assessment Committee, heard the proposal and objection, and determined to amend the valuation list by increasing the gross and net rateable values as proposed by the rating authority. The farmer gave notice of appeal to quarter sessions who stated this special case under s. 11 of the Quarter Sessions Act, 1849, by consent of the parties.

The facts set out in the special case were as follows: The farmer occupied the two cottages for the accommodation of agricultural workers employed by him on his land. The cottages were not let to those workers, who lived in them by virtue of their employment. Number 45 was used as the dwelling of a foreman who received 4*l.* a week without any

" carrying on or directing agricul-
" tural operations on that land ;
" or (b) is employed in agricultural
" operations on that land in the
" service of the occupier thereof
" and is entitled, whether as tenant
" or otherwise, so to use the
" house only while so employed,
" shall, so long as the house is so

" occupied and used, be estimated
" by reference to the rent at which
" the house might reasonably be
" expected to let from year to year
" if it could not be occupied and
" used otherwise than as afore-
" said."

(1) [1946] K. B. 442.

deduction in respect of the cottage, and No. 46 as the dwelling of a tractor-driver who received, on the average, 3*l.* 15*s.* a week, from which 3*s.* a week was deducted in respect of the cottage. Each cottage was "a house occupied in connexion with agricultural land and used as the dwelling-house of a person who . . . is employed in agricultural operations on that land in the service of the occupier thereof and is entitled . . . so to use the house only while so employed" as prescribed by s. 72 of the Local Government Act, 1929.

Acting under the Agricultural Wages Board (Regulation) Acts, 1924 and 1940, the agricultural wages board constituted under those Acts made an order, dated December 1, 1943, fixing minimum rates of wages for agricultural workers in the county of Worcester; and the Worcestershire Agricultural Wages Committee, by order dated December 12, 1941, defined the benefits or advantages which might be reckoned as payment of wages in lieu of payment in cash and the value at which they were to be reckoned, including the following: "(a) cottage including any garden provided with the cottage—3*s.* per week, less any rent or rates which may be paid by the occupier." That 3*s.* a week was fixed throughout Worcestershire irrespective of the size or amenities of any particular cottage. The minimum wages payable under the Agricultural Wages Regulation Acts and under the orders were 3*l.* 5*s.* a week until March 4, 1945, and after that date 3*l.* 10*s.* a week.

It was contended for the farmer: (a) that, by virtue of the Agricultural Wages (Regulation) Acts and orders made thereunder, he might not deduct from the wages of a person employed in agricultural operations on his land in his service any sum greater than 3*s.* a week in respect of the cottage; (b) that he could not, by letting the cottages to persons employed in agricultural operations on his land in his service, or otherwise, lawfully receive from them any sum greater than 3*s.* a week; (c) that the gross value of each of the cottages, so long as occupied and used in the manner in question, could not exceed 3*s.* a week or 7*l.* 16*s.* a year; and (d) that the gross values of 12*l.* and 10*l.* determined by the rating authority were therefore contrary to law.

It was contended for the rating authority and the assessment committee: (a) that the rent at which each of the cottages might reasonably be expected to let from year to year, if it could not be occupied and used otherwise than as it was, was not limited by the value at which it was to be reckoned as

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payment of wages in lieu of payment in cash ; (b) that the sum of 3s. a week deductible from wages was not rent ; (c) that, if either of the cottages were let to a person employed on the land in the service of the appellant farmer, the rent which could lawfully be charged would not be limited by the value at which it was to be reckoned as payment of wages in lieu of payment in cash ; and (d) that, in considering the rent at which each of the cottages might reasonably be expected to let from year to year if it could not be occupied and used otherwise than as it was, regard could be had to the rent which the appellant farmer would himself be willing to pay.

The question left by quarter sessions for the opinion of the Divisional Court was whether or not, on the facts stated, the gross value of the two cottages, ascertained in accordance with s. 72 of the Local Government Act, 1929, was limited by the value at which they were to be reckoned as payment of wages in lieu of payment in cash under the relevant statutory provisions.

The Divisional Court held that the gross rateable value of the cottages was not to be limited by reference to the weekly sum of 3s. which was the most which the farmer could receive for it, by deduction from wages or otherwise, from the worker, since a farmer might be willing to pay a larger sum in rent for the cottage in order to secure accommodation for an agricultural worker whom he wished to employ.

The farmer appealed.

Rowe K.C. and *Harold Williams* for the farmer. *Williams v. Smith* (1) shows that the occupier, that is, the farmer here, could not get for one of these cottages, while let to agricultural workers, more than 3s. a week. Two principles of law are here involved : On the one hand where a statute directly prohibits the letting of a hereditament at more than a certain rent, that prohibition directly affects the rateable value : *Sculcoates Union v. Kingston-upon-Hull Dock Co.* (2). On the other hand, there is the principle, laid down in *Poplar Assessment Committee v. Roberts* (3), that the limitation imposed by the Rent Restriction Acts on the letting of premises does not affect their rateable value. The rating authority here have valued these cottages on the basis that more could be got for them than the 3s. deductible from wages. The principle in *Poplar Assessment*

(1) [1934] 2 K. B. 158.

(2) [1895] A. C. 136.

(3) [1922] 2 A. C. 93.

Committee v. Roberts (1) does not apply here because the tenant of a house within the Rent Restriction Acts is free to pay more in rent than the landlord can legally demand, whereas, since *Williams v. Smith* (2), that is not so in the case of a cottage used to accommodate an agricultural worker. The principle does not apply for the further reason that the Rent Restriction Acts have no relation to rates, whereas, in s. 72, the Local Government Act, 1929, expressly relates to rates the letting of cottages to agricultural workers. Moreover, Lord Buckmaster said in *Poplar Assessment Committee v. Roberts* (3) that the value of the premises to the landlord was irrelevant for determination of the proper assessment. Here, however, it is not only the landlord who is affected, but also the farmer as tenant. The value of the premises to him, as tenant, must, it is submitted, affect their rateable value.

Their value to him as tenant is intended by s. 72 to be ascertained without reference to external competition for the cottages and also without reference to internal competition among farmers in the neighbourhood. Once it is found that a particular person is in possession of such a cottage, the next step under s. 72 is to ascertain whether he is a person engaged in agricultural operations, in the service of the occupier, on a particular piece of agricultural land. If those conditions are satisfied, the next step again is to ascertain what would be a fair and reasonable sum to receive in rent for the cottage on the assumption that it can only be let to the occupier of that land and his employees on that land. That has the effect of eliminating from the hypothetical market the actual competition prevailing before the Act of 1929 was passed.

Capewell K.C. and *Squibb* for the rating authority and the assessment committee. The agricultural legislation fixing the 3s. a week has no relation to rating. Section 72 says in effect that the competition for the cottages is to be limited to the farmers in the neighbourhood, the assumption being that the cottages are vacant and to let. The hypothetical tenant is to be found among farmers, that is, who will put a service tenant into the cottages. [Tucker L.J. The case, as stated, does not raise the issue whether competition from other farmers is or is not to be taken into account.] It is submitted that that is implicitly raised by the contentions of the parties. [Tucker L.J. The object of the case seems merely to have been to obtain a ruling as to whether the assessment is tied to the

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(1) [1922] 2 A. C. 93.

(3) [1922] 2 A. C. 103.

(2) [1934] 2 K. B. 158.

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3s.] Section 72 does not limit the valuation for rating purposes of the cottages to the amount which an agricultural worker will be paying for them. Even if it does so limit the valuation, it does not limit it to this 3s. a week. Under s. 72 the rent still has to be estimated at which the cottage can be reasonably expected to let from year to year. It is the occupation not of the agricultural worker, but of the farmer, which is envisaged by the section. The worker is not a tenant from year to year, for his occupation is conditional on his continuing to be employed on the land with which the cottage is connected. The person renting the cottage from year to year subject to the limitation on the way in which it is to be occupied is the farmer. He is the tenant of the cottages, which are not let to his employees. Even subject to the restriction specified by s. 72, the cottages will let for more than the 3s. which is the most that can be obtained for them by deduction from wages, for it is a great advantage to a farmer to secure accommodation near his farm for his workers, and he will not be deterred in his pursuit of a suitable cottage by the knowledge of that restriction. What s. 72 does is to prevent a cottage from being rated as if it were an ordinary cottage capable of being let, for example, to tenants wishing to use it at week-ends only. The section contemplates only that regard shall be had to a restrictive covenant whereby only a farm worker may occupy the cottage. In any event, the rateable value is not to be limited by reference to the 3s. a week. That sum results from legislation having as little to do with rating as have the Rent Restriction Acts, so that the principle in *Poplar Assessment Committee v. Roberts* (1) applies. The restriction on use to which s. 72 of the Act of 1929 refers cannot be interpreted so narrowly as to be referable to the 3s. a week emanating from legislation in no way concerned with rating.

Rowe K.C. replied.

LAWRENCE L.J. [after referring to the special case.] The only question which we have to determine is whether the value of these cottages is, by virtue of s. 72 of the Local Government Act, 1929, to be taken at the 3s. laid down by the Agricultural Wages (Regulation) Acts. [His Lordship read the section.]

As I understand the judgment of Lord Goddard C.J., the Divisional Court has decided the case in favour of the assessment committee and the rating authority on the view

(1) [1922] 2 A. C. 93.

that the rent at which these cottages might reasonably be expected to let from year to year, if they could not be occupied and used otherwise than as aforesaid, would be a rent which might be expected to be obtained from the competition of any farmers in the neighbourhood who wanted the cottages for occupation by their farm workers.

Mr. Rowe, for the appellant farmer, has contended that that view of s. 72 is wrong. His argument is based on the words in para. (a) "that land," and in para. (b) "or is employed in "agricultural operations on that land." He says that the restrictive covenant is to be imagined as attaching to the cottages a covenant that they could not be occupied and used "otherwise than as aforesaid"; that is to say, otherwise than by the agricultural workers of the farmer of "that land." That would have the effect, so he says, of excluding the competition of all other farmers, and would lead to competition, so far as the rent was concerned, merely between the farmer of the land and any employees of his on that land. That argument was not, however, agreed to by the Divisional Court, who held that the competition might be by any farmers, who would, as the court said, be prepared to give a rent in all probability higher than the 3s. which was merely the sum fixed for the purpose of the minimum wage and which the employer could deduct from the cash wages paid.

It appears to me, however, that the special case does not raise that question, and that it is unnecessary for this court to decide whether s. 72 excludes or includes the competition of all farmers. The special case seems to me to put the question simply as being whether or not the valuation must have regard only to the 3s. rent which is laid down by the Agricultural Wages (Regulation) Acts. In my opinion, on that question the rating authority and assessment committee are clearly right. Even if the only hypothetical tenant to be taken into account is the farmer in whose employ the worker who is occupying the cottage is, that farmer, I do not say would—but might—be prepared to pay a higher rent for the cottages than the 3s. laid down by the Agricultural Wages (Regulation) Acts. Those Acts and the Local Government Act, 1929 have nothing to do with each other. It seems to me, as a matter of fact and as a matter of ordinary economy, that a single farmer, without any competition from any other farmers, might be prepared to rent these two cottages—and that the appellant farmer might have been prepared to rent them—at

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more than 3s. a week for the purpose of obtaining accommodation for his employees. Therefore, I should answer the question put by the special case in the negative, and should be in favour of dismissing the appeal.

TUCKER L.J. I agree. I think that s. 72 of the Local Government Act, 1939, envisages as possible hypothetical tenants of these hereditaments either the agricultural workers, employed in agricultural operations on the land in question, or the farmer, that is, the person in occupation of the agricultural land which is being worked, who takes the hereditament for his own occupation, for letting to his farm worker or for allowing the farm worker to live there as a licensee. Thus, the hypothetical tenants are the farm worker or the farmer.

The argument is that, in any event, by reason of the operation of the Agricultural Wages (Regulation) Acts, 1924 and 1940, and the orders made thereunder, the value, for the purposes of rating, is fixed irretrievably, once and for all, at 3s. a week because that sum has been fixed as the maximum which may be deducted from the wages fixed by the statute as payable to the farm workers. Furthermore, it has been decided by the Divisional Court in *Williams v. Smith* (1), the correctness of which both sides accept, that, if the cottages are let, they cannot be let to the farm worker at a rent in excess of 3s. It is said to follow from that, as a matter of law, that there is only one figure which can be taken as the gross value, namely, the figure arrived at on the basis of the 3s. a week. In my view, that is the only point which the case raises. If that contention is right, the appellant farmer succeeds. If it is not right, he fails. I think that he fails. To begin with, it would be a surprising result, from the rating point of view, if an Act fixing the remuneration of agricultural workers had had the effect of fixing one uniform gross value for all kinds of hereditaments of different sizes and types in Worcestershire merely because they were occupied by a particular class of person. Yet that would be the result if Mr. Rowe were right.

The special case, in my opinion, raises the question whether the figure must be taken at 3s. a week, or whether, as is contended by the rating authority and the assessment committee, in considering the rent at which each of the cottages might reasonably be expected to let from year to year if it could not be occupied and used otherwise than as aforesaid, regard can be had

(1) [1934] 2 K. B. 158.

to the rent which the appellant farmer himself would be willing to pay as being the farmer whose employees are in occupation of the cottages. I should have thought that what the farmer, as one of the hypothetical tenants, would, in fact, be willing to pay was clearly an element proper to be taken into consideration in fixing the value for rating purposes of the cottages. I agree that a willing landlord and a willing tenant must be envisaged, but I think that the fact that a willing tenant will, if he becomes the tenant, only be able to deduct 3s. from his employee's wages in respect of the user of the hereditament, or, if he lets it, will not be able to let it at more than 3s. a week, is only one of the elements, though a very important element, to be taken into consideration in arriving at the value for rating purposes. There are other elements to be taken into consideration, namely, the desire of the farmer to secure the cottage to house one or more of his workmen, or, I suppose, the desire to obtain it for his own occupation. Those seem to me to be proper elements to be taken into consideration, even assuming (which it is not necessary to decide for the purposes of this case) that other farmers desirous of obtaining the cottages for similar purposes must be excluded altogether as possible competitors. As I have said, it does not seem to me that this case raises that point, and I express no opinion on it. I agree that this appeal fails.

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COHEN L.J. I agree.

Appeal dismissed.

Solicitors: *Ellis & Fairbairn; Vizard, Oldham, Crowder & Cash, for Smith & Roberts, Evesham.*

THE KING v. WEYMOUTH BOROUGH COUNCIL.

Ex parte TELETAX (WEYMOUTH), LIMITED.

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April 16.

Licensing—Hackney carriage—Purchase by applicants of licensed taxicabs—Refusal of local licensing authority to transfer licences to new owners or issue new licences to them—Mandamus—Town Police Clauses Act, 1847 (10 & 11 Vict., c. 89), s. 37.

Lord Goddard
C.J.,
Atkinson and
Oliver JJ.

A licence issued under s. 37 of the Town Police Clauses Act, 1847, by a local licensing authority, for a hackney carriage to ply for hire within the area of the authority, is a licence for the vehicle and not to the proprietor thereof, and if any change of ownership takes

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place during the licensing year the new proprietor is entitled to have his name and address substituted for the name and address of the former owner in the authority's register of licences, and on the licence itself.

APPLICATION for order of mandamus.

The applicants, Teletax (Weymouth), Ltd., are a limited liability company, which on May 29, 1946, was incorporated for the purpose (*inter alia*) of operating a taxi-cab service in the borough of Weymouth. In July, 1946, the company purchased five taxi-cabs which were already in use in the borough and which had been duly licensed by the respondents, the Town Council of Weymouth, as the licensing authority, under the Town Police Clauses Act, 1847, to ply for hire as hackney carriages within the borough. The company applied for the transfer of the licences of the five vehicles to itself, but the council, on the recommendation of the watch committee, refused. Considerable negotiations followed, but the council adhered to its decision and the applicants now asked for an order of mandamus directed to the council to hear and determine their application according to law, and to give effect to the change of ownership of the five vehicles by amendment of the licences and the council's register of licences, or, alternatively, by the issue of new licences in the name of the applicants.

During the hearing counsel for the applicants read a transcript of a shorthand note, taken by a member of the Press, of the proceedings at the meetings of the council at which the requisition for the transfer of the licences was refused, from which it appeared that two councillors, who admitted that they were interested in the running of taxi-cabs within the borough, had nevertheless spoken in favour of the refusal and indicated their willingness to "take over" the taxi-cabs in question. They had further used language which, counsel suggested, insinuated that the applicants were Jews and undesirable characters. The applicants therefore claimed that the proceedings of the council were vitiated by prejudice.

An affidavit sworn by the Town Clerk of Weymouth stated that: "It has since the conclusion of the war been the intention of the council to safeguard the interests of returning ex-servicemen, for many of whom the running of a taxi-cab is one of the few employments for which their war-time service has left them fit and capable. Both before and after

" the application by Teletax on June 21, 1946, the council
 " received applications from a number of such men for the
 " grant of licences, and their names were placed on a waiting
 " list pending a vacancy "

J. T. Molony for applicants. By s. 37 of the Town Police
 Clauses Act, 1847 (1) the Weymouth Borough Council are
 empowered to licence such number of hackney carriages as
 they think fit, to ply for hire in their area, and they have fixed
 the maximum number as sixty. The council are also required
 by s. 41 (1) to keep a register of the names and addresses of the
 proprietors of the licensed carriages. The discretion given to
 the council is mainly as to the number of vehicles necessary,
 in the interest of the public, to serve the area. Section 50 (1)
 provides for the suspension or revocation of a licence on the
 conviction for the second time of the proprietor or driver for any
 offence under the Act, but no provision is made for withdrawing
 the licence if there is a change of ownership of the vehicle.
 It is therefore reasonable to imply that there is power to transfer
 during the currency of the licence. The question of number
 does not arise, because it has been determined and the vehicles
 now owned by the applicants are included in the number
 deemed by the council to be necessary. The only question is
 whether the person putting himself forward as the new owner is
 entitled to be registered as such. The present motion asks for

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(1) Town Police Clauses Act,
 1847. Section 37: " The Com-
 " missioners may from time to
 " time license to ply for hire within
 " the prescribed distance, or if no
 " distance is prescribed, within
 " five miles from the General Post
 " Office of the city, town, or place
 " to which the special Act refers
 " (which in that case shall be
 " deemed the prescribed distance)
 " such number of hackney coaches
 " or carriages of any kind or
 " description adapted to the car-
 " riage of persons as they think
 " fit."

Section 41: " In every such
 " licence shall be specified the
 " name and surname and place of
 " abode of every person who is a

" proprietor or part proprietor
 " of the hackney carriage in
 " respect of which such licence is
 " granted."

Section 43. [Licence to be in
 force for one year only.]

Section 46 [Drivers not to act
 without first obtaining a licence.]

Section 50. " The Com-
 " missioners may, upon the con-
 " viction for the second time of the
 " proprietor or driver of any such
 " hackney carriage for any offence
 " under the provisions of this or
 " the special Act with respect to
 " hackney carriages . . . suspend
 " or revoke, as they deem right,
 " the licence of any such proprietor,
 " or driver."

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an order of mandamus to determine the issue according to law, but it also gives the council the alternative either to transfer the existing licences to Teletax (Weymouth), Ltd., or to issue new licences in the name of Teletax (Weymouth), Ltd. The reports of the proceedings before the council indicate clearly that prejudice was introduced by councillors who, being pecuniarily interested, spoke at length in favour of the refusal to transfer. The reason that there was a waiting list of ex-servicemen was not put forward at the time of refusal, but much later.

[Lord Goddard C.J. I think you must argue that being a bona fide purchaser of the vehicles you are entitled to a transfer. Supposing the holder of a licence dies: someone must be entitled to carry on the licence and use the vehicle. Are your clients not in this difficulty, that all the licences expire on April 30, and you might not get a renewal?]

I have to face that fact, but although the council can review de novo at the end of the licence year, the fact that the applicants are on the register would weigh a good deal. It is my submission that the licence is transferable as a matter of public interest.

[Lord Goddard C.J. The cab has to be licensed and the owner thereof has to be registered. You must show that X.Y. can compel the council to register him as the transferee although there are other persons wanting licences. The fact that the council have taken into consideration all sorts of irrelevant considerations is immaterial, because they were only asked to transfer.]

I submit that it is the carriage which has to be licensed and not the owner. The owner has to be registered, and if I become by purchase the proprietor of a licensed hackney carriage I am entitled to be registered as such.

[Lord Goddard C.J. On the other hand in the case of the driver it is the person who is licensed: see s. 46.]

Vernon Gattie for respondents. In the particular circumstances the court will only grant mandamus if the obligation on the council is to give effect to the change of ownership by recording the change in the register and altering the licence. If the licence applies only to the vehicle I cannot dispute that obligation, but in my submission licences granted under the Act are not merely licences of the vehicle but must be taken to be personal licences. The form in which the licences in question are drawn up is not, I admit, a statutory form.

It is based on the form given in the Encyclopædia of Forms and Precedents: It is not a licence which is attached to any particular vehicle, because the driver, who gets it, has to hand it to the proprietor, who has to keep it, but to hand it back to the driver if he leaves the proprietor's employment.

[Lord Goddard C.J. Section 41 seems to be very much against you. It emphasizes that the licence is granted for the vehicle and not to the proprietor.]

If that were so then the day after the grant of a licence the proprietor could dispose of the vehicle to any one and the council would be bound to give effect to the change. It is to be noted that s. 50 speaks of suspending or revoking "the licence of any "such proprietor" and not "the licence of the carriage." If the court takes the view that the licence is peculiar to the vehicle and that any change of ownership has automatically to be given effect to, I cannot argue that mandamus does not lie. In the circumstances it is unnecessary to deal with the question whether the council proceedings were vitiated, but I would add that I am not instructed to justify the remarks of the two councillors which have been referred to.

LORD GODDARD C.J. In my opinion this mandamus must go. The question that is raised is one of considerable importance to local authorities who are entrusted with the duty of granting licences in respect of hackney carriages, under the Town Police Clauses Act, and it raises a question which apparently has never yet been the subject of a decision in this court. The material facts are very few and can be stated in few words. Some time in the summer of 1946, the company that moves for this mandamus, a company called Teletax, Ltd., acquired five taxi-cabs from different persons in the borough of Weymouth, which taxi-cabs at that time were licensed, and had been licensed at the general licensing meeting held for that purpose by the corporation of Weymouth, for one year. Those licences were current and would not expire until April 30 of this year. Having acquired those taxi-cabs, they applied to the town council for the licences which had been granted in respect of those taxi-cabs to be transferred to them; and I think it is only fair to the council to say that it may very likely be that the use of the word "transferred" caused and led to a good deal of the confusion which I am satisfied has occurred in this case.

The matter was the subject of several debates. In the first

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place, the watch committee, to whom these applications go in the first instance, reported to the council against the application, and the council affirmed the watch committee. At a later date, the watch committee appear to have reconsidered the matter and to have advised that licences should be issued to Teletax, Ltd., but the council refused to adopt the recommendation of the watch committee and refused the application ; but there is no doubt that, although it comes rather at a late stage, the precise nature of the application which the company desired to make was put forward in a letter from the company's solicitors, dated December, 16, 1946, saying : " We think it " well, therefore, for you to know that our clients' counsel " advised that your council under the Town Police Clauses " Act, 1847, are bound by necessary implication to consider " and give effect to changes in owners of licensed vehicles, and " that mandamus will lie to compel them so to act and to " exclude irrelevant matters from their consideration."

When the application for leave to move for the order was made, the relief that was claimed was " an order for mandamus " to the Weymouth borough council to hear and determine " according to law the application of the applicants to recognize " and give effect to the change of ownership of the said five " hackney carriages, by amendment of the licences and the " council's register of licences, or alternatively, the issue of " new licences in the name of the applicants."

The matter really depends on the true construction of certain sections in the Town Police Clauses Act of 1847, for it is under that Act that local authorities grant hackney carriage licences. Really, the sole question in the case, in my opinion, is whether or not the licences which are granted in these cases are granted in respect of cabs, or whether they are granted in respect of proprietors of cabs. We are not concerned here with driving licences. We are simply concerned here with the licensing of a particular vehicle to be on the road for the purpose of plying for hire within the district of the local authority ; and before that can be done a licence must be obtained, no matter who the driver is, and whether the driver is a licensed driver or not, because by s.46 the licensing of drivers is with regard to the driving of licensed cabs.

His Lordship then read s. 37 of the Act of 1847 and continued : That seems to be a reasonably clear section, and if we give it the ordinary meaning which the English language bears, it is quite clear that the commissioners are to license a

vehicle as a hackney carriage. It also seems reasonably clear that what Parliament had in mind was that it was desirable that the commissioners should be able to control the number of carriages which plied for hire in a given area, and should also be entitled to prescribe the kind and the description of the carriages. No doubt it would give the local authority power to refuse to grant a licence if they thought that the construction of the cab, to use the common expression, was not satisfactory. I have no doubt they could take that matter into consideration, and certainly could take into consideration the number of cabs which were already licensed, so that there would not be an undue number or, on the other hand, if they found there were not enough for the reasonable requirements of the public, they would be able to license more from time to time as they thought fit.

I do not think I need read s. 38 in detail, because that is merely saying what vehicles are to be considered hackney carriages. Then s. 40 provides that before any such licence is granted, a requisition for the same, in such form as the commissioners from time to time provide for that purpose, shall be made and signed by the proprietor or one of the proprietors of the hackney carriage in respect of which such licence is applied for. Observe here that there is no direction in this section that the proprietor has to make an application for a licence for himself. He is to fill in a requisition, and the requisition is to be signed by the proprietor of the hackney carriage in respect of which such licence is applied for. That, again, appears to show that it is the vehicle which is licensed, and not the person owning the vehicle. Then, "and in every "such requisition shall be truly stated the name and surname "and place of abode of the person applying for such licence, "and of every proprietor or part proprietor of such carriage, "or person concerned, either solely or in partnership with any "other person, in the keeping, employing, or letting to hire of "such carriage." Then there is a penalty of 10*l.* if untrue statements are made. Section 41 seems to me to be also of considerable importance. It provides that in every such licence shall be specified the name and surname and place of abode of every person who is a proprietor or part proprietor of the hackney carriage in respect of which such licence is granted, or who is concerned, either solely or in partnership with any other person, in the keeping, employing, or letting to hire of any such carriage, and also the number of such licence, which

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shall correspond with the number to be painted or marked on the plates to be fixed on such carriage, together with such other particulars as the commissioners think fit. There, again, there is a clear statement in the section that it is the hackney carriage that is licensed. It would have been perfectly simple in that section, as indeed in s. 37, or in any other section of this part of this Act, to refer to the licensing of the proprietor to keep a particular carriage, if Parliament had so intended. They seem to have emphasized in the sections I have already read that the licensing is the licensing of a carriage, and not of any particular person.

Then there is a provision that every licence shall be made out by the clerk of the commissioners, and duly entered in a book to be provided by him for that purpose, and in such book shall be contained columns or places for entries to be made of every offence committed by any proprietor or driver or person attending such carriage, and any person may at any reasonable time inspect such book without fee or reward. The object of that would seem to be clear; it gives the public a right to inspect the register of hackney carriages, which must state who the proprietor is, so that if the public have reason to bring an action for personal injury or otherwise, they may see who the proprietor is who can be sued. There is a further provision that every licence shall be in force for one year only from the day of the date of such licence, or until the next general licensing meeting, in case any general licensing day be appointed by the commissioners, and also one in s. 44 that notice shall be given by the proprietors of hackney carriages of any change of abode.

Then I think s. 45 ought to be noted: "If the proprietor or "part proprietor of any carriage, or any person so concerned "as aforesaid, permits the same to be used as a hackney carriage "plying for hire within the prescribed distance without having "obtained a licence as aforesaid for such carriage, he shall be "liable to a penalty." Contrast the sections I have read with s. 46, which says:—"No person shall act as driver of any "hackney carriage licensed in pursuance of this or the special "Act to ply for hire within the prescribed distance without first "obtaining a licence from the commissioners." There you get the clear words which show that, with respect to the driver, it is the driver who is to be licensed.

What then is the effect of these sections? In my opinion, they clearly show that the licence is granted to the carriage,

and that that licence remains in force for a year from the time when it is granted, or until the next annual licensing meeting of the commissioners, if they appoint a date before the annual granting of these licences. What then is to happen if during that year a change of proprietorship takes place? There is the vehicle; it has its licence attached to it. There is nothing in this Act which says that the vehicle may not be sold, or may only be sold with the consent of the council. There is no provision here to say that if a person has obtained a licence for a cab and disposes of it, or dies, that he or his personal representatives must surrender the licence. What is necessary is that the register should be kept in order and kept up to date. Therefore, it seems to me that, by necessary implication, a person who buys a cab which has been licensed is under a duty to go to the authority and say: "I am now the proprietor of this cab which you licensed for a year; please therefore enter me in the register as the proprietor, and substitute my name on the licence granted in respect of the cab, in the place of the name of the earlier proprietor."

We are not concerned here to consider whether or not Parliament might have made different provisions. Parliament seems to have said that a licence to a cab, if the commissioners grant it, is to be given for a year. I cannot think it was meant, and I think the necessary implication is the other way, that if that cab is sold during the year, the proprietor who buys the cab is never to be allowed to use the cab during the year. Of course, he takes his chance that he may not get his licence renewed, but that raises entirely different questions. Once the licence expires, as it will do, at the end of the year, then he will have to apply, and he will have to put in a requisition in respect of the cab which he wishes to use as a hackney carriage.

In my opinion the council have viewed this matter from a wrong angle. One of the councillors, I noticed, did raise this question in an acute form at one of the meetings. He said he wanted to be advised whether the licence was to the cab or the man with the cab. Had it been pointed out then, or had this court given a decision then, that the licence attached to the cab and not to the man, I think it is quite possible that the council might have come to a different conclusion. I think also the council had probably been misled to some extent by the form of the licence which they had been in the habit of issuing, and which we are told is borrowed from a publication called

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Encyclopædia of Forms and Precedents (vol. 12, 2nd ed., p. 528). It is to be noted that the section in the Statute does not prescribe any particular form of licence, nor, indeed, does it prescribe any particular form of requisition for a licence. In fact, the precedent for a licence of this sort given in the Encyclopædia is perfectly correct: it is in form a licence for a vehicle and not a personal licence, and it would be well if that form were used in future. Section 40, as I have already said, provides that the requisition is to be in such form as the commissioners shall from time to time provide for that purpose, but the form of licence which is used in the Borough of Weymouth reads in this way: "We, the Mayor," and so forth, "of the Borough of Weymouth and Melcombe Regis, in the County of Dorset, by virtue of the provisions in that behalf of the Public Health Act, 1875, and all other powers enabling us in that behalf do hereby licence (blank) of Weymouth, the owner of the hackney carriage numbered (blank) to stand and ply for hire with said carriage, within the said borough, subject to the provisions of the said Acts, and to such by-laws relating to hackney carriages as are, or may from time to time be, in force in the said Borough." What the Act seems to require is a licence for a hackney carriage. Once that licence is granted, then the hackney carriage may stand and ply for hire in any street. We are also told in a note to the publication to which I have referred: "This licence is not transferable." Merely stated in that way, I think it is right. If a licence is granted in respect of cab A it cannot be transferred to cab B; that is clear; but what we have to consider is a different matter, and that is whether or not, when cab A, which has been licensed, is sold to another owner, that other owner is entitled to have his name substituted for that of the previous owner and, in my opinion, he clearly is.

Certain other questions have been raised by Mr. Molony in support of his application for a rule. It is said here that the mandamus ought to go because persons took part in the debate—although they did not vote—who were interested parties. The court does not propose to give any decision on that point, as to how far the mere fact that they were interested and took part in the debate would vitiate a decision of the council if it were otherwise unobjectionable, because we have already said enough to decide this case on different lines. But I think it is desirable that the councillors of the borough of Weymouth should be reminded of the express words of s. 76 of the Local

Government Act of 1933 (1). The court observes with concern that two members who did disclose that they had an interest, in that they were or at least desired to be competing owners of taxi-cabs, nevertheless took part in this discussion, one of them, a person called Councillor Bell, taking a very prominent part in this discussion and using arguments and language which we can only say should be strongly deprecated. To bring any charges against the persons concerned in this company in the language in which they did is a matter for which any councillor should be severely reprimanded. I am speaking for myself only at the moment, and I can only hope that some attention will be called to this matter and that councillors will refrain, in the discharge of responsible public duties, from making use of arguments which in this country would be regarded as really, I think I may use the word, reprehensible. I am glad to see that the Mayor did say that one of these members had disclosed his interest, quite properly, and that he should not take part in the debate. I can only say that it is a pity that that councillor did not obey the ruling of the Mayor, but continued to carry on the debate by the well-known device of asking questions, instead of making a speech.

The result is that the order of mandamus will go in accordance with the terms of the notice of motion and with the usual results as to costs.

ATKINSON J. I agree with what has been said by the Lord Chief Justice, and there would be no object in repeating what he has said. There is one consideration, however, which I think assists the applicants here, and that is the position of the proprietor who has sold his hackney carriage. He must be entitled to have his name removed from the register, and to have his name removed from the licence which has been granted. If he gave notice to the commissioners, similar to the notice required by s. 44, I should have thought that if they refused to remove his name from the register, he could

(1) Local Government Act, 1933, s. 76: "If a member of a local authority has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter, and is present at a meeting of the local authority at which the contract or other matter is the

"subject of consideration, he shall
 "at the meeting as soon as practicable after the commencement thereof, disclose the fact, and shall not take part in the consideration or discussion of, or vote on any question with respect to, the contract or other matter."

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come here for mandamus to make them do so. This seems to indicate that the council must be bound to take notice of changes of ownership and to keep their register accurate in accordance with the true position. If the old proprietor has a right to have his name removed, I should have thought it was equally clear that the new proprietor has a right to have his name inserted in place of that of the old proprietor.

OLIVER J. I agree with every word that has fallen from my Lords. I only wish to add that I am in the fullest agreement with the strictures which have been passed on the behaviour of two of the councillors concerned in the debate, one of them, in particular, a man openly interested and openly advocating his own financial interest in the debate upon a public matter. I fully agree with every word of censure that has been passed, and I was glad to observe that Mr. Gattie, who argued the case for the council, identified himself with that view.

Mandamus granted.

Solicitors for applicants : *Brash, Wheeler, Chambers, Davies & Co., for Glanvilles, Portsmouth.*

Solicitors for respondents : *Sharpe, Pritchard & Co., for Percy Smallman, Town Clerk, Weymouth.*

A. W. G.

Approved. CLARK. PROPERTY, ETC. CO. v. [1948] 1 K. B. 680 Affirmed. C.A. [1948] 2 All E.R. 875.

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Mar. 26.

Denning J.

ARTILLERY MANSIONS LIMITED v. MABARTNEY.

Landlord and tenant—Rent restriction—Flat let at a rent including payment for attendance—Amount attributable to attendance agreed between the parties—Payment as additional rent—Presumption of correctness—Whether substantial part of rent—Ascertainment of rent—Payment for furniture to be included—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-s. 2, proviso (i.)—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32), s. 19, sub-s. 1.

An unfurnished flat was let at a rent of 170*l.* a year with an additional rent of 15*l.* for service charges. It was not proved that the 15*l.* was not a fair estimate of the value of the services provided. On a claim for possession the plaintiffs contended that the premises were excluded from the Rent Restriction Acts by proviso (i.) to sub-s. 2 of s. 12 of the Act of 1920.

Held, that in ascertaining whether the payment in respect of attendance was a substantial portion of the whole rent, such payment must be included in the rent.

L. H. Woods & Co., Ltd. v. City & West End Properties, Ltd. (1921) 38 T. L. R. 98, followed.

Observations of Younger L.J. in *Wilkes v. Goodwin* [1923] 2 K. B. 86, 105, applied.

Wood v. Wallace (1920) 90 L. J. (K. B.) 319, and *Hocker v. Solomon* (1921) 91 L. J. (Ch.) 8, not followed.

Held, also, that the amount agreed between the parties as attributable to attendance must be assumed to be a genuine pre-estimate of its value and should be prima facie taken to be correct, and that as such amount did not form a substantial part of the whole rent the action failed.

Palser v. Grinling [1946] K. B. 631, considered and applied.

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ACTION.

The plaintiffs were the landlords of a flat of which the defendant was the tenant. The flat, which was on the fifth floor of a large block of flats, was let unfurnished under an agreement made in June, 1944 to a Mr. Anderson, who subsequently assigned the tenancy to the defendant. Under the agreement the flat was let for one year from June 24, 1944, and thereafter on a quarterly tenancy at a rent of £170l. a year. In addition the tenant agreed to pay the company by way of further or additional rent a sum of £15l. a year for service charges. A clause in the tenancy agreement provided as follows: "The service to be provided by the company shall include keeping the rooms and furniture clean, sweeping chimneys, cleaning windows, lighting fires, valeting and general attendance." By another clause the company agreed to arrange for the staircase to be kept clean and to provide a hall porter to attend to the hall door and to take messages and parcels. Apart from the above contractual services the company in fact also provided a storeroom in the basement, where the tenants could keep luggage, etc., a lift and a liftman, central heating and a hot water supply. There was further a system whereby a housekeeper was available to cook meals for, and serve them to, tenants of the flats in the block.

On a claim by the plaintiffs for possession of the defendant's flat, the plaintiffs contended that the flat was excluded from the Rent Restriction Acts by proviso (i.) to sub-s. 2 of s. 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act,

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1920 (1), by reason of the fact that it was let at a rent which included a payment in respect of attendance.

Diplock for the plaintiffs.
Sebag Shaw for the defendant.

DENNING J. The question in this case is whether this flat is excluded from the Rent Restriction Acts by reason of the fact that it is let at a rent which includes payment in respect of attendance. I start with the fact that the rateable value is less than the prescribed amount of 105*l*. Prima facie, therefore, this flat is within the protection of the Acts. Turning to proviso (i.) to sub-s. 2 of s. 12 of the Act of 1920, I find that it is let at a rent which includes payment in respect of attendance. I am satisfied that the earlier cases of *Wood v. Wallace* (2) and *Hocker v. Solomon* (3), should no longer be followed, having regard to the decision of the Divisional Court in *L. H. Woods & Co., Ltd. v. City & West End Properties Ltd.* (4), and the observations of the Court of Appeal in *Wilkes v. Goodwin* (5), and particularly the observations of Younger L.J., where he says: "The word 'rent' in this exception surely " means not rent in the strict sense but the total payment under " the instrument of letting." In this case the total payment under the instrument of letting is not only the 170*l*. but also the 15*l*., making 185*l*. altogether. Any other view would lead to an impossible position, having regard to the fact that when the contractual tenancy comes to an end the tenant is entitled to the benefit of all the terms and conditions of the contract of tenancy which are consistent with the Act. Therefore it is

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 2, proviso (i.): "this Act shall not, " save as otherwise expressly provided, apply to a dwelling-house " bona fide let at a rent which " includes payments in respect of " board, attendance, or use of " furniture."

Rent and Mortgage Interest Restrictions Act, 1923, s. 10, sub-s. 1: "For the purposes of " proviso (i.) to sub-s. 2 of s. 12 of " the principal Act . . . a " dwelling-house shall not be

" deemed to be bona fide let at a " rent which includes payments in " respect of attendance or the use " of furniture unless the amount " of rent which is fairly " attributable to the attendance " or the use of the furniture, regard " being had to the value of the " same to the tenant, forms a " substantial portion of the whole " rent."

(2) (1920) 90 L. J. (K. B.) 319.

(3) (1921) 91 L. J. (Ch.) 8.

(4) (1921) 38 T. L. R. 98.

(5) [1923] 2 K. B. 86, 105, 106.

necessary that all payments which are made in respect of the contractual stipulations should be added together and treated as rent for the purpose of the Act. This rent of 185*l.* included payments in respect of attendance, and, therefore, it is within that proviso.

The amendment effected by s. 10, sub-s. 1, of the Act of 1923, which provides that the amount fairly attributable to attendance must form a substantial portion of the rent, is primarily dealing with the familiar case where there is an inclusive figure, including both the strict rent and the payment for attendance. It is the task of the court in such a case to find out how much of the inclusive sum is fairly attributable to the attendance. That task is facilitated by the observations in the Court of Appeal in *Palser v. Grinling* (1). In my opinion, those observations also apply in a case such as the present, when it is not an inclusive rent, but the parties of themselves have settled one sum for the rent and another for the services, subject to the qualification that in the ordinary way it is reasonable to assume that the amounts allocated are a genuine pre-estimate of the value of the services therein mentioned. In the present case evidence was given that on the original letting the sum was a genuine estimate; but in any case, evidence or no evidence, when the parties have themselves specified a certain amount in their contract for service charges, that should ordinarily be taken as a genuine pre-estimate of the value of the matters concerned. I am confirmed in this view when I consider the analysis which has been put before me. It has been compiled with the greatest care in accordance with the judgment of Morton L.J. in *Palser v. Grinling* (2), but it became apparent in the course of the evidence that there were considerable margins of error and considerable difficulties arising in making the various apportionments, adjustments, estimates and deductions which are required by that calculation. When you have such a difficult matter to assess and estimate, if you find that the parties have in their agreement set down a figure, it is *prima facie* to be taken as correct. In this case I see nothing in all these calculations to satisfy me that that 15*l.* is not a perfectly proper figure to put upon the value of the services which are contractually provided for that sum. It is not necessary for me to go into the particular details. With regard to the question of the lift and the liftman, there is no contractual right to it, as I under-

(1) [1946] K. B. 631.

(2) *Ibid.* 635.

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stand the agreement, so that in accordance with what Morton L.J. said, it is a matter which I should disregard, but in any case, following the approach in all these cases to what constitutes attendance, I myself should have thought that the provision of a liftman operating a lift such as this, which, in ordinary circumstances, is an essential means of access to the flat, would not be attendance.

The words in s. 10, sub-s. 1, of the Act of 1923 are : " unless " the amount of rent which is fairly attributable to the " attendance . . . , regard being had to the value of the " same to the tenant, forms a substantial portion of the whole " rent." In regard to the whole rent of 185*l.*, the 15*l.* does not form a substantial part within the test laid down by the Court of Appeal in *Palser v. Grinling* (1). It is less than 15 per cent. of the whole. In the result, in my judgment, this action fails. The house is *prima facie* within the Rent Restriction Acts, and the landlord has not satisfied me that there are circumstances existing which take it out of the Acts. On the claim for possession therefore there will be judgment for the defendant with costs.

Judgment for defendant.

Solicitors for plaintiffs : *Wainwright & Pollock, O'Bryen-Taylor & Co.*

Solicitor for defendant : *William Foux.*

(1) [1946] K. B. 635.

H. A. P.

Approved. CASSIDY v. MINISTRY OF
HEALTH. [1951] 1 All E.R. 574.

Considered. CASSIDY
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ANOTHER.

Mar. 3, 4, 5,
6, 7, 10, 11.

Hilbery J.

Negligence—Public hospital—Owners and managers—Junior house surgeon (student) and part-time surgeon, both on pay list—Liability of owners and managers of hospital for acts of surgeons—Power to direct actions of surgeons and how to perform them.

Damages—Contribution—Tortfeasors liable in respect of same damage—Claim by one against the other for contribution—Principle of apportionment—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30), s. 6, sub-s. 1 (c) and sub-s. 2.

Practice—Cause of action—Limitation of actions—Writ claiming damages for negligence against a public authority—Vicarious liability for actions of certain servants or agents—Amendment of statement of

claim at hearing—New act of negligence alleged on part of another servant—Allegation, by new particular, of original cause of action—Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 21.

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The medical superintendent of a public hospital had notified the owners and managers that E. M. K., a student in her last year and not yet a registered medical practitioner, was employed (temporarily, but full time) in the capacity of a resident junior house surgeon and that A. H. H., a surgeon of standing on the medical register, on accepting the appointment of an employee on the staff, undertook to attend at the hospital on two days each week, for a fixed number of hours, and to be on call on certain other days. Both persons were on the pay list of the hospital. A. H. H. was guilty of an act and E. M. K. of acts of negligence, as a result of which a patient at the hospital died. In an action by the widow of the patient against the hospital authority and A. H. H.:—

Held, that the authority were liable by reason of a negligent system in the provision of dangerous drugs. On the issue of the vicarious liability of the authority.

Per Hilbery J.:—The obligation undertaken by the owners and managers of the hospital to the patient was to be responsible for the acts of the resident junior house surgeon, but not for those of the visiting surgeon, since in the case of the resident junior house surgeon they had, and in the case of the visiting surgeon they had not, the power to direct him or her what to do and how to do it.

Dicta of Lord Greene M.R. in *Gold v. Essex County Council* [1942] 2 K. B. at pp. 301-2 cited.

Two persons were liable as tortfeasors in respect of the same damage. One claimed from the other contribution by virtue of s. 6, sub-s. 1 (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935. By sub-s. 2 of that Act, the amount of the contribution recoverable from any person shall be such as "may be found by the court to be just and equitable, having regard to the extent of that person's responsibility for the damage":—

Held that the contribution was to be apportioned, not according to the relative negligence, i.e., culpability, of the two tortfeasors, but according to the relative effect of their acts in causing the damage.

Smith v. Barry (Wickham, Third Party) (1939) 56 T. L. R. 200, followed.

A public authority, owning and managing a hospital, were sued on the ground that the death of a patient was the result of their negligence in and about the conduct of their hospital. By the statement of claim the negligence was said to be (1.) a defective and negligent system in the provision of dangerous drugs, and (2.) the negligence of (a) a resident medical officer (student), and (b) of a visiting surgeon, both on the pay list of the hospital. At the hearing, application was made for leave to amend the state-

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ment of claim by the addition of a claim that the authority was also liable for the negligence of a pharmacist employed at the hospital :—

Held that the proposed amendment amounted to no more than an amendment of the particulars of the cause of action endorsed on the writ, namely negligence in and about the conduct of the hospital, and did not constitute the addition of a new cause of action to which the defendants could, at the date of the amendment, have pleaded s. 21 of the Limitation Act, 1939. The proposed amendment, therefore, could be allowed.

ACTION by the widow of James Henry William Collins under the Fatal Accidents Acts, 1846–1908, claiming damages against the Hertfordshire County Council, as the proprietors and managers of the Wellhouse Hospital, at Barnet, Hertfordshire, on the ground that the death of her husband was the result of their negligence in and about the conduct of their hospital, and against Mr. Alan Henderson Hunt, a surgeon who operated on her husband at the said hospital, on the ground that he had, owing to his failure to exercise reasonable care, injected into her husband as a local anæsthetic what was, in fact, a lethal dose.

By the statement of claim it was alleged that the county council was liable by reason of a defective and negligent system for the provision of dangerous drugs and also vicariously, for the negligence of Elizabeth Mary Knight, a resident junior house surgeon, being a student in her last year who had passed her examination in pharmacology, but who was not then a qualified medical practitioner, and for the negligence of Alan Henderson Hunt, a visiting surgeon. At the hearing of the action, counsel for the plaintiff applied that the statement of claim should be amended by the addition of the allegation that the county council was responsible for the negligence of a pharmacist employed at the hospital. The application was granted, subject to any adjournment required in consequence of the amendment by the county council. The widow also, as the legal representative of her husband, claimed damages against both defendants under the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of his estate. This claim was abandoned at the hearing of the action.

With regard to the appointment and service of Miss Knight at the hospital, Hilbery J. said : “ Miss Knight was employed “ as a whole-time resident medical officer on the terms of an “ appointment form used for this purpose both in her case and, “ I am sorry to say, in the case of Mr. Hunt, because I am quite

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"satisfied that really in the case of Mr. Hunt it is an inappropriate form to use ; but stock forms are of great use and are a great saving of time, provided that the stock forms are used for the purposes for which they were devised. I do not think that the form used in the case of the appointment of Mr. Hunt was ever devised for any such purpose, nor intended for use in any such circumstances, nor do I think that it was a particularly appropriate one to use for the appointment of Miss Knight. It was a notification to the clerk of the council of the appointment of an employee to the staff of the County Council Assistance Department, Barnet Area. The material part was : ' Dear Sir, the undermentioned has been appointed to the staff of this department, and the following are the full particulars of appointment.' That is signed by the medical superintendent at the hospital, Dr. Segar, and says that Ellen Mary Knight is employed in the capacity of a junior house surgeon (student) from March 4, 1945, that the employment is temporary and full-time employment, and that the remuneration is an annual basic cash salary, or basic weekly wage at the date of the appointment, of 50*l.* per annum, and the particulars of emoluments, if any, are described as ' resident, annual value 100*l.*' I am not sure that very much help is to be derived from the use of that form. It was not intended to be a written contract between the parties. It is a letter from the medical superintendent of the hospital to the clerk of the council, notifying the clerk that he, the medical superintendent, is putting on the staff of the hospital this particular officer on these particular terms. At the end of the form, all that Miss Knight did was, just as Mr. Hunt did, to sign a certificate that ' The particulars of my previous service with local authorities set forth above are complete and correct to the best of my knowledge and belief.' "

Of Mr. Hunt's appointment and services, his Lordship said : " There was a similar form which spoke of the capacity in which he was employed as that of a temporary, part-time person taking the appointment of an employee on the staff of the county council, and apparently undertaking specifically to attend upon Tuesday, three hours, and Friday, four hours, and to be on call Tuesdays, Thursdays and alternate Fridays and week-ends at an annual basic cash salary at the date of the appointment of 500*l.* per annum, without apparently any prospect of rising by any increments, because that part of the form is left blank."

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The facts were stated by Hilbery J., as follows, with his findings of fact : The first defendants, the Hertfordshire County Council, own and manage the Wellhouse Hospital, at Barnet, in the county of Herts, under the powers of part VI of the Public Health Act, 1936. In 1945 they had a resident house surgeon, a Miss Knight, who was a last-year student, not a qualified medical practitioner, although she had already passed some parts of her final examination, and, what is perhaps most important, in pharmacology. The defendant county council had at the same hospital, as an operating surgeon, the second defendant, Mr. Alan Henderson Hunt, a surgeon holding the highest possible qualifications in surgery, and from all that I have heard in this case, obviously meriting them. On April 20, 1945, one James William Henry Collins, whose widow brings this action, was a patient in this hospital having been received by the defendant county council for treatment. He had a fairly extensive growth of the jaw, which required a very serious operation. That operation was undertaken by Mr. Hunt. On that day, Mr. Collins, while upon the operating table for the purpose of that operation, and while that operating was being carried out, was killed by the injection into him of 80 cc. of 1 per cent. cocaine mixed with 1-20,000th of adrenalin. That injection was given by the surgeon in the belief that he was injecting a perfectly proper and harmless local anæsthetic, a mixture of 1 per cent. procaine with 1-200,000th of adrenalin.

On the evening of April 19, 1945, Miss Knight, acting as the resident surgical officer at the hospital, as was usual, rang up the surgeon, Mr. Hunt, to know his orders for the next day, being one of the days in the week when he was operating at the hospital, beginning at about 1.30 p.m., performing those operations which were assigned to him. Miss Knight rang up on the telephone to ascertain the order in which he would take his patients, what were his special requirements with regard to each of the operations and to receive his orders. It was said at once, that Collins's operation would come first. Collins's operation, which would involve an excision of the lower jaw, was likely to be one which would take a considerable time : it was a heavy, difficult and delicate operation. Mr. Hunt gave his directions. At the other end of the telephone Miss Knight had her notebook in front of her and she took down what she thought were the directions given by Mr. Hunt, who for the purpose of this operation, required very few special instruments. One of the

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most important and a very special instrument, was a jaw-splint, a very peculiar type of splint, which had to be held by pegs let into the jawbone at positions where the jawbone was capable of holding the pegs, and then adjusted. That instrument was one which he mentioned, and Miss Knight took down "jaw-splint, sterilized; fine-pointed knife; lip retractors, "sterilized." The first two articles which she had entered in her book were intended to be Mr. Hunt's requirements for what was obviously, and she realized it (if she had thought about it she must have realized it, and she says now that she did know that it was so) to be used for injection as a local anæsthetic, with a vasoconstrictor mentioned with it. I am satisfied beyond any question that what Mr. Hunt ordered was 1 per cent. procaine with 1-200,000th adrenalin. Miss Knight misheard it. There is not the least doubt that she has acted in perfect good faith in this matter, but she misheard it, and, strangely enough, those of us who have taken part in this trial must have observed that it is possible, even in the same place, talking directly, to have some doubt whether a person at one moment is saying "pro-caine" or "cocaine." Over the telephone some sounds are notoriously distorted. Whether this is one of them or not, I do not know. At any rate, that came to Miss Knight's hearing as "cocaine," and she wrote down in her book "100 cc. "1 per cent. cocaine," and she added to that "adrenalin." Nobody has ever heard of injecting anything like 100 cc. of 1 per cent. cocaine into anybody. A lethal dose would be 20 cc.; indeed, that is probably more than a lethal dose; and 100 cc. would be five times the lethal dose of cocaine. Moreover, I am satisfied by the evidence in this case that at this time throughout the surgical and medical profession cocaine had ceased to be used for injection as a local anæsthetic, because of its toxicity. It had been found to be far too dangerous a poison, although it had the qualities that were necessary for local anæsthesia and, as I understand it, to some extent for vasoconstriction.

Miss Knight did know what a lethal dose of cocaine, if injected, was. Her next entries in her book were "syringe" and "needle," immediately after the entry about 100 cc. of cocaine, and she admits that she must, of course, have realized that it was for injection, whatever it was that Mr. Hunt was then ordering. But she says, "although I knew that, and although "I knew that 100 cc. of cocaine would be five times a lethal dose "none the less I did not know how much of the 100 cc. of 1 per

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cent. cocaine Mr. Hunt intended to inject." She was receiving an order for something which, if she had heard it aright, was a local anæsthetic which she, of her experience of Mr. Hunt, of this hospital and of the work in the theatres of this hospital, knew had never been used before either by him or in the hospital. She says that she repeated as she took down what Mr. Hunt said to her, but she did not in any sense particularly call his attention to what she thought she had heard ; she gave him no sort of intimation of what she was taking down, believing that she had heard it as " cocaine." It is true that she says that she repeated it, and the doctor in the room where she was says she repeated it. The repetition may or may not have got through to Mr. Hunt, but, even if it got through to him, it may have been so pronounced that he misheard it. His mishearing her communication seems to me to be a very different thing from Miss Knight having misheard his, because he was conscious that he had said " procaine " and he would not expect the word " cocaine " to come back. Miss Knight at the time she heard the word used by him did not know what was coming, except that she did know that he used in the theatre what was always used in that theatre. I think the misunderstanding had its origin in this fact, that in the theatre at the hospital down to that time the old name for this particular drug, " novocaine," was still used. Miss Knight used " novocaine " as a term in that theatre because it still was used there, and all in the theatre called this drug " novocaine," although the official title for it at this time had become " procaine." I need not say more as to the many grounds for saying that Mr. Hunt did not—indeed, it is impossible to suppose that he could have done so—talk of " 1 per cent. cocaine " as being one of his requirements. At the time he was lecturing on local anæsthetics and was using the word " procaine " daily, and indeed many times a day in his operations as a busy surgeon, and he did not use the word " novocaine " except, I am inclined to think, in this theatre, in deference to the people who used the word " novocaine." He may have used it there, and that may be what led Miss Knight to say that in that theatre she had always heard it as " novocaine." It may be that he did use the word " novocaine," because he knew that that was the word by which people in this hospital knew the drug. That is how the misunderstanding began ; that is what started the train which led to this lethal dose being administered to this patient.

Miss Knight went to the pharmacist at the hospital armed with her book. She did not give the pharmacist any written prescription for this or any order to dispense this mixture. She told the pharmacist by word of mouth to make up this 1 per cent. cocaine, and she said she asked him what was the usual quantity of adrenalin and that he told her that it was 1 in 20,000. So it came to be made up of 1 in 20,000 adrenalin and 1 per cent. cocaine. In my view, there is no doubt that she told him that it was wanted for Mr. Hunt's operation the next day, and there is equally no doubt to my mind that he knew that it was for use on a particular patient in a particular operation, because the evidence before me shows that he sent it up as a sterile solution for injection and in an open flask only plugged with cotton wool at the top, obviously because it was for immediate use and not for stock, that is to say, as a stock preparation to be kept in the theatre. If it had been sent up for stock as a stock preparation, it was his duty to put it into a fluted, coloured bottle used for poisons and specially designed for use for poisons only, because with the fluting on the bottles, even if a nurse or sister goes to a cupboard when no light is available, to get one out, she will know by touch when she has got hold of a poison bottle. The pharmacist sent it out in an open plain flask, sterilized and marked in large letters with a grease pencil on the outside, "1 per cent. cocaine and 1-20,000th adrenalin." The next action of Miss Knight was to give the theatre sister a list of Mr. Hunt's requirements for that operation. I have in front of me her little slip which she gave the acting theatre sister. The regular theatre sister was away at the time and not on duty, but a highly experienced, fully trained sister, who has been before me and made the best possible impression upon me, was there. At about 1 p.m. on April 20, when she was getting together Mr. Hunt's requirements for this operation, when the flask from the pharmacist came up, marked as I have said, she checked up against the list given her by Miss Knight and saw that it was, as Miss Knight's list said it should be, 100 cc. of 1 per cent. cocaine and adrenalin in solution. The sister then placed the flask with other bottles on the shelf above the sink or basin where the surgeon would do his scrubbing before beginning his operation, and there it remained until in the course of the operation the surgeon called for the local anæsthetic, having arrived at that stage in the operation where it was needed.

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At that stage, again, as heretofore in the case of some parts of Miss Knight's evidence, there is a difference of statement about what occurred. I think this is clear. When Mr. Hunt had done this highly difficult and skilful adjustment of this particular jaw-splint and had almost concluded it, he asked for the local anæsthetic. Sister Rockhill thereupon pointed the nurse to the flask which stood upon the shelf, and she watched to see that the nurse took down the right flask and poured it into the appropriate sterilized bowl on the trolley. Then Sister Rockhill filled the sterile syringe with the solution and handed it to Mr. Hunt, the surgeon. So far that seems to me to be beyond question. But there then emerges a controversy as to what actually took place. Mr. Hunt is not perfectly certain. He inclines to think that he himself filled the syringe the first time, and he says, what indeed he wrote and said to the Coroner at the time, that he asked, "Is this the 1 per cent. procaine?" and that Sister Rockhill said "Yes." Then he said, "As far as I recollect, I filled the syringe in the first place, and I certainly did for the second and third injections." Sister Rockhill says, "At about 1 o'clock"—and this operation began soon after half-past one—"I had checked the contents of the flask as inscribed upon it in grease pencil, '1 per cent. cocaine and 1-20,000th adrenalin,' against that same prescription written on the piece of paper given to me by Miss Knight. I knew it was 100 cc. of 1 per cent. cocaine. The surgeon did not ask me: 'Is this 1 per cent. procaine?'" "I did not mishear anything. It was not mishearing through masks. He did not ask me that." I heard Sister Rockhill pressed from every angle and with every sort of consideration upon this matter, and without faltering and without wavering she gave to me her statement in a way which carried to me the complete conviction of truth. The importance of that is this. It is conceded that every surgeon takes responsibility for what he injects into a patient as an infiltration or injection for a local anæsthetic and that he should take some step reasonably to make sure, before he injects it, that he is injecting that which he ordered. Different surgeons, like Mr. Colt and Mr. Griffiths, have told me what they regard as essential if they are to discharge that duty. I am not saying that there may not be other ways of discharging those duties than those ways which are adopted by Mr. Griffiths and Mr. Colt. Mr. Griffiths takes the very greatest care, because he checks to see that what he is going to inject is that which he has ordered, and so does

Mr. Colt. But, of course, one ought always to remember the background of these affairs. The surgeon ordering a solution for use as a local anæsthetic is not giving the order to people who have never before heard of such things. He is not giving it to people who are not skilled ; they are skilled and experienced people. For example, in this case Mr. Hunt gave his order to Miss Knight expecting her to use her skill and reason and to bring her mind to bear upon what he was saying. If she did not sufficiently do that, he was not to suppose that she would not. In addition, he knows that it will be prepared in a hospital. He would know that it would be prepared by Miss Knight herself probably, going to the theatre and taking from stock 100 cc. of 1 per cent. procaine which would be there in stock and then measuring out 1-200,000th, which is equal, I believe, to approximately 5 minims, of adrenalin, and he would be right, in my view, to suppose that a skilled person like that would do it ; but still there remains in him a residuum of obligation and duty as the surgeon who will make the injection, according to the evidence before me, to make an efficient check to see that he is getting what he ordered, whoever has mixed it or however it has been mixed. Mr. Hunt's case here is : " I did that. I accept that obligation, " that measure of duty, and I did make a check, because before " I injected I asked the sister, ' Is this 1 per cent. procaine ? ' " I am satisfied that Mr. Hunt is a man of honour, who has only told me what he profoundly believes to be the fact, and it may be that it is the fact that in the circumstances which I am about to relate he did say at some stage, " Is this 1 per cent. " procaine ? " but, if that was said, I am certain that it was not at the moment at which it was said intended as a test of whether he had got the right mixture or not, but was directed to whether he was filling his syringe from the right bowl. Those are two quite different things. I hope everybody will understand that in the decision to which I am coming on this topic I am not in the least making any imputation on the skill of Mr. Hunt any more than I am making any imputation upon his honour, honesty or truthfulness. It is quite consistent with this, that he should believe and be convinced in his mind that he did ask that, intending that it should be a test, whereas in fact the sister is right and on this particular occasion he omitted to do that. I think all the circumstances are such as to show that it was just such an occasion as that on which a man habitually careful might omit one step which, after all is said

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and done, must appear in the circumstances to the surgeon to be of comparatively minor importance. Mr. Hunt omitted the one step of checking whether he had got the right solution, because he did not even ask the question which he says he asked, and I am bound to say that to me the evidence of the sister carried complete conviction. For him, he had ordered a perfectly ordinary and his regular anæsthetic, and he had no reason to suppose he was going to get anything else. It was a matter of routine that he should receive the local anæsthetic that he expected to have handed to him and he had not the slightest reason to suppose that the ordinary routine would not be followed. At the moment he was involved in an operation which he personally had never performed before—an operation which required the greatest skill, delicacy of touch and concentration, and, concentrating as he was on that at that moment when he asked for the local anæsthetic, expecting, I am certain, to get what he always had had, he just omitted to check.

There ought not to have been any necessity for him to check. If the system which was actually at that time in operation at the hospital had not been as utterly defective and dangerous as I think it was, the lethal dose that was presented to him could not have been presented to him. If Miss Knight had used reasonable care and skill in the performance of her duties it could not have reached him. If the pharmacist had used reasonable care and skill in the performance of his duties that mixture could never have reached him. If either Miss Knight or the pharmacist had called his attention to what Miss Knight was ordering ; if either of them had called any qualified person's attention to it, in my view, that qualified person would at once have rung up Mr. Hunt and said, " Did you ever order " such a thing as this ? " Nobody had ever heard of such an order for injection.

There were regulations which were apparently hidden from Miss Knight—not, of course, wilfully hidden but which had never been discovered, according to her. The regulations which should have been in operation at the hospital and which are, therefore, useful as indicating what the hospital authorities state should be the system, when they are found, include amongst other things these provisions : " 8. Every order for " dangerous drug (including dangerous hypnotics and sedatives) " i.e. choloral, paraldehyde, sulphonal, etc., must be dated and " the drug and dosage clearly written, and the time to be given

" stated and the entry initialled by the Medical Officer
 " 9. Verbal instructions as to treatment and ordering of drugs
 " and medicines are not allowed. All instructions as to
 " treatment drugs and medicines must be clearly stated in
 " writing under ' Treatment ' column." So that this order for
 this drug for this injection into this patient ought to have been
 entered on the patient's case sheet, written and signed by the
 medical officer. If by " medical officer " is meant " fully
 " qualified medical officer," as I expect it is (because at the time
 when the regulation was drawn I suppose that nobody had
 heard of a medical officer other than a fully qualified one)
 it is perfectly plain that Miss Knight had no right to make
 an entry on the patient's sheet and sign it. She was not fully
 qualified although she was the medical officer. But there is a
 little green book which was on the table in the room which she
 and the other resident medical officer used, although she had
 never had her attention specially directed to it or was told that
 she was to read, mark, learn and inwardly digest it. In that,
 which was entitled " Routine Procedures " for the hospital,
 at p. 18, para. 4, I find : " All prescriptions for dangerous drugs
 " and preparations containing them must be initialled by a
 " medical officer and the number of doses specified." No doubt
 that is primarily intended to refer to medicines given in the
 course of treatment in a medical case, but it is, at any rate, a
 warning that the hospital recognizes that dangerous drugs and
 preparations containing them ought to be initialled by a medical
 officer.

It is alleged in the statement of claim as originally
 drawn, that the hospital has a vicarious responsibility
 for the alleged negligence of Miss Knight. I think that it
 is quite clear that Miss Knight did not use reasonable skill and
 care in her office which she was performing under a contract of
 whole-time service as a resident medical officer for the defend-
 ant county council. She admits that she knew that this
 solution was for injection ; she admits that it was 1 per cent.
 cocaine, she knew what a fatal dose of cocaine was, and she
 knew that cocaine had never been used in that theatre or in
 that hospital or by Mr. Hunt as a local anæsthetic, but, faced
 with all that, she did not immediately query to Mr. Hunt what
 he had ordered. Her mind might not have jumped sufficiently
 quickly with many other things to think of at that moment, but
 she had taken it down and she had time, and if she had exercised
 reasonable care she must have given it more consideration,

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when she read it over. On reading it over, apparently it still did not strike her, although she had passed her final examination in pharmacology, and, as far as I know, she was as highly qualified then as she is now, when she is able to go on the medical register, and she should have known just as well as she should know to-day that there must have been some mistake somewhere if such a solution was to be used as an injection. In addition, if she knew the contents of the little green book—and she says she had seen it—she must have known that she ought to have the initials of a qualified person, because this was a dangerous drug which was being ordered. She took no steps to get any qualified person to initial it. I am quite sure that no qualified person would have initialled it without referring to Mr. Hunt. There is a difference in the evidence of Miss Knight and Mr. Hunt as to what took place during the operation. I do not think that Miss Knight's evidence as to the incidents at the operation is to be relied on. For example, she certainly told the Coroner that the flask was handed to the surgeon at the operation. I am perfectly satisfied that it was not. Sister Rockhill is conclusive about that: "Ordinary procedure was followed. The nurse handled the flask, pouring the contents into the small bowl. The syringe was filled from the small bowl." Miss Knight to-day says: "If I did say that, I was wrong, because that is not my recollection to-day." In addition, Mr. Hunt says that in the course of the operation, as there were some students present to whom he was giving a demonstration in local anæsthesia, he asked Miss Knight, expecting her to be able to give the right answers, because he knew how far on she was in her qualifying period "What are the local anæsthetics which are vaso-constrictor?" He says, "Miss Knight murmured 'Cocaine,' just loud enough for me to hear the word. I said, 'I never use cocaine because of its toxicity.'" Miss Knight says that that is not what Mr. Hunt asked. She says, "He asked 'why am I injecting this?' and the only reason I could think of at the moment was for post-operative anæsthesia," and so she said, "For post-operative anæsthesia." "I never heard him ask, 'what are the anæsthetic drugs which are vaso-constrictor?'" I said, "Post-operative anæsthesia," and he said, "No: hæmostasis." I said, "why cocaine?" The next I heard was Mr. Hunt saying, "too toxic." It is very odd that there should be very different evidence of what was asked or what was not asked. But even if Miss Knight's own

version is right, the moment she had murmured "cocaine," which she knew was about to be injected, because she had ordered it, she received an answer about its toxicity—"too toxic"—and yet her mind still did not work sufficiently for her to say "that is cocaine. Look out! Stop!" To me that is amazing and quite obviously not the exercise of reasonable skill and care. Even at that stage, perhaps, none of the local anæsthetic having yet been injected, or, if only a part of it was in process of being injected, it is quite likely that with an immediately applied antidote all would have been well. Of course, by the time that 80 cc. had been injected nothing, so far as I can see, could really have saved this man's life. There is always a possibility, and I am told that there was just a chance even then, if anyone had thought that cocaine had been injected that his life might have been saved, but I received the impression from the evidence that it would have been a very remote chance, once 80 cc. of 1 per cent. cocaine with 1-20,000th adrenalin had already been infiltrated into the patient's system.

Lastly, Miss Knight, with her training, should have known, and I am satisfied did know, that a pronounced symptom of acute cocaine poisoning was convulsions such as the patient here developed very quickly after these injections. Even then Miss Knight's mind did not turn to the fact that she had ordered 1 per cent. cocaine for injection into this patient. That was the last moment at which there was any hope of saving the patient's life; and up to the last moment Miss Knight remained as one who in the circumstances failed to exercise reasonable skill and care.

On the issue as to the vicarious liability of the hospital:

Montague Berryman K.C. and *Everett* for the defendants, the Hertfordshire County Council:—Neither Miss Knight, the student house surgeon, nor Mr. Hunt, the visiting consulting surgeon, were the servants of the defendant county council and the doctrine respondeat superior has accordingly no application. The question of the liability of the governors of a hospital for the acts of negligence of a resident house surgeon were specifically left undetermined in *Gold v. Essex County Council* (1) but a visiting consulting surgeon was said not to be the servant of the hospital on the ground that he has entered into a contract "for" services and not a contract "of"

(1) [1942] 2 K. B. 293.

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service. There is no power to control the manner in which he shall carry out his duties as a surgeon and this principle is equally applicable to a house surgeon even though a student—*Gold v. Essex County Council* (1); *Simmons v. Heath Laundry Co.* (2); *Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool), Ltd. and Another* (3).

In so far as it is sought by way of amendment of the statement of claim to make the defendant council liable for the alleged negligence of the pharmacist the amendment raises a new cause of action which is barred by the provisions of s. 21 of the Limitation Act, 1939, and the plaintiff cannot succeed on this point—*Marshall v. London Passenger Transport Board* (4) and *Batting v. London Passenger Transport Board* (5).

The real cause of the death of the deceased was the negligent failure by the defendant Hunt to carry out the duty which he admitted rested upon him to check the anæsthetic personally before injecting it into the patient and thus assure himself that he was injecting that which he had ordered by telephone the previous night.

R. T. Paget and *S. C. Silkin* for plaintiff. The liability of the hospital authority depends primarily on the obligation undertaken by the authority towards the patient, Mr. Collins. What was the patient entitled to expect? See the observations of Lord Greene M.R. in *Gold v. Essex County Council* (6). Lord Greene M.R. also said, speaking of the powers of a county council under the Public Health Act, 1936: "It is clear, " therefore, that the powers of the defendants include the power " of treating patients, and that they are entitled and, indeed, " bound in a proper case, to recover the just expense of doing so. " If they exercise that power, the obligation which they " undertake is an obligation to treat, and they are liable if the " persons employed by them to perform the obligation on their " behalf act without due care " (7). Again, he said: " in " each case the first task is to discover the extent of the " obligation assumed by the person whom it is sought to make " liable. Once this is discovered, it follows of necessity that " the person accused of a breach of the obligation cannot " escape liability because he has employed another person, " whether a servant or agent, to discharge it on his behalf, and

(1) [1942] 2 K. B. 293.

(2) [1910] 1 K. B. 543.

(3) [1947] A. C. 1.

(4) [1936] 3 All E. R. 83.

(5) [1941] 1 All E. R. 228.

(6) [1942] 2 K. B. 293, 301-2.

(7) *Ibid.* 304.

"this is equally true, whether or not the obligation involves "the use of skill" (1). What then was the contract between the patient and the county council? It was that the patient should enter this hospital to undergo an operation for which the patient was to pay them an inclusive fee. The obligation of the county council towards the patient was to perform the operation and this they could only do by some human person, but it matters not whether that person is a servant or an agent or a sub-contractor. The obligation was that of the county council and they were responsible. The appropriate maxim is not "respondeat superior," but "qui facit per alium facit per se."

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Even if the test is still whether the owners and managers of the hospital can control the actions of those they engage not only in what they do, but in the manner of doing it, Miss Knight, the resident junior house surgeon and the pharmacist were engaged on a contract of service. See the Routine Procedures for the Hospital in the green book kept in the medical officer's room, and the Regulations of the Hospital, Nos. 8 and 9 (supra). It is clear that the hospital authority claimed the right to control these officers in the performance of their duties.

By the statement of claim the plaintiff claimed that the death of her husband was the result of the negligence of the hospital authority in and about the conduct of their hospital. The amendment to the statement of claim alleging the negligence of the pharmacist was merely a particular of the cause of action originally claimed and is not barred by s. 21 of the Limitation Act, 1939. An allegation of negligence against a corporation necessarily implies an allegation of negligence by some servant, since a corporation cannot be negligent save by a servant.

Havers K.C. and *H. C. Dickens* for *A. H. Hunt*, the second defendant.

HILBERY J., having stated the facts and his findings, continued :

I have stated the facts in this case : what do they indicate ?

It is clear to my mind, in the first place, that the hospital was on this occasion permitting a system to be in operation which was dangerous and negligent. Miss Knight was enabled, under the system that they allowed, to take an order for a dangerous

(1) [1942] 2 K. B. 301.

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drug in an extraordinary quantity to the pharmacist to be dispensed, she being an unqualified person, and to get it dispensed without it being ordered on a prescription in writing or any prescription or order signed by a qualified person. She told me she did that as a matter of course and that she had done it in respect of other dangerous drugs, such as morphia. The system which was being operated at the hospital was such that the pharmacist accepted that order and dispensed the drug in sterile form for an injection, knowing that it was for a patient who was to be operated on, and sent it up, and he did all that without having any qualified person's signature. At the moment I am looking at the circumstances to see to what extent the system in operation at the hospital was a cause of the death which occurred.

On the evidence before me I am satisfied that the hospital negligently failed to bring to the mind and attention of Miss Knight, when they appointed her, the regulations that they regarded as necessary for the management of the hospital; they had not brought to her particular attention the requirements of their routine procedures or that she was bound to adopt them, and they were permitting a state of affairs where a dangerous drug in an extraordinary quantity was to be made up in a solution with a very high fraction of another drug, which thereupon became a deadly poison. If they had had a proper system in operation, this solution could not have arrived at the theatre, let alone arrived at the body of the unfortunate patient.

Although, in one sense, it is sufficient for me to say, what I have said about the hospital, I think it is incumbent on me to find certain other matters. As regards Miss Knight's situation, the question whether the hospital is vicariously responsible for her want of care, in addition to its own responsibility for its own negligent system, involves a point of law about which the situation seems at present to be highly uncertain. Recently, in the case of *Gold v. Essex County Council* (1), observations have been made on the situation of a hospital with regard to various persons and officers ordinarily to be found employed by a hospital in order that the hospital may fulfil its functions. Prior to *Gold v. Essex County Council* (1), it was very generally accepted, after the decision in *Hillyer v. St. Bartholomew's Hospital (Governors)* (2), though exactly what was decided in *Hillyer's* case has been the subject of much discussion

(1) [1942] 2 K. B. 293.

(2) [1909] 2 K. B. 820.

and some difference of opinion, that the test to be applied was whether the officer for whose negligence it was sought to make the hospital vicariously responsible was performing his duties under, on the one hand, a contract for services, or, on the other hand, a contract of service. If on the facts the right view was that such an officer was doing the duties in question in performance of a contract of service, then the hospital was vicariously liable. If, on the other hand, he was doing the duties in pursuance of a contract for services, as a professional man, then there was no vicarious responsibility on the part of the hospital authorities. Mr. Berryman has called my attention to a very useful decision in *Simmons v. Heath Laundry Co.* (1), where the Court of Appeal had in the neatest possible form the one question to decide, which was whether certain services rendered by the appellant were services which were rendered pursuant to a contract of service or to a contract for services. The appellant there, being employed in the Heath Laundry Company's laundry as a machine hand, received injuries in the course of and arising out of her employment. In addition to doing that work, the appellant gave lessons in pianoforte playing to a neighbour's children, for which she received 3s. a week. She, as she was entitled to do if those earnings of 3s. a week were earnings which came from a contract of service, claimed to have them taken into consideration in assessing what her earnings were so as to arrive at the proper figure of compensation under the Workmen's Compensation Act, 1906. The Court of Appeal there considered the matter, and I think the short effect of their decision is, as it has been put to me here that the distinction between the contract for services and the contract of service can be summarized in this way: In the one case the master can order or require what is to be done, while in the other case he can not only order or require what is to be done but how it shall be done. I observe that there Buckley L.J., cites with approval Bramwell L.J.'s statement in *Yewens v. Noakes* (2) that "A servant is a person subject to the command of his master as to the manner in which he shall do his work." I think that the words, "as to the manner in which he shall do his work," is only the same thing as saying what I have just said, "subject to the master's orders as to how it shall be done." I think that is consonant with the recent decision in the House of Lords in the case of *Mersey Docks and Harbour*

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(1) [1910] 1 K. B. 543.

(2) (1880) 6 Q. B. D. 530, 532.

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Board v. Coggins & Griffith (Liverpool), Ltd. and Another (1), where it is true that the court was considering the matter from a different angle and in different circumstances, but the case was one where the House of Lords had to decide what was the test to apply to find out whether in what a man was doing, which resulted in injury to a third party, he was to be held in law to be the servant of one or another person, or of both. The decision that had to be made was the decision as to where the responsibility for what the crane driver did in that case rested—on which superior, or, to put it more accurately, which of those parties was the superior to the driver so as to make him responsible in law. They held that the test to discover that was as Lord Uthwatt puts it at p. 23 (and I think he is only putting exactly what the Lord Chancellor has put in another way) “The proper test is whether or not the hirer had authority “to control the manner of execution of the act in question.” [His Lordship then stated the terms of Miss Knight’s appointment at the Wellhouse Hospital as set out at the beginning of this report.] I derive from the letter of the medical superintendent very little help towards solving the conundrum whether there is vicarious responsibility on the part of the county council here for the omission and negligence of Miss Knight.

But when I turn to the case of *Gold v. Essex County Council* (2), it appears to me—and I say this most earnestly—that if I am not misinterpreting what the Master of the Rolls said and what the effect of that decision is, first of all, the case of *Hillyer v. St. Bartholomew’s Hospital (Governors)* (3) is no longer a binding authority, and, secondly, that the Master of the Rolls’ decision passes upon this basis, that in such a case (the first thing that one has to do is, as he says at p. 301, to ascertain what the obligation is which the one party is assuming towards the other. What is the obligation that the hospital authorities assume towards the patient who comes to them for admission and treatment? He continued: “Apart from “any express term governing the relationship of the parties, “the extent of the obligation which one person assumes towards “another is to be inferred from the circumstances of the case. “This is true whether the relationship be contractual (as in the “case of a nursing home conducted for profit) or non- “contractual (as in the case of a hospital which gives free

(1) [1947] A. C. 1.

(3) [1909] 2 K. B. 820.

(2) [1942] 2 K. B. 293.

"treatment)." I pause there to say that while I have no evidence in this case, I cannot blind myself to the fact that this patient who was admitted was a man earning 57*l.* a year, and the almoner of such a hospital would take that into account and would make out a charge upon the conclusion of this treatment, and the county council would have power under the Public Health Act, 1936, to recover the costs of the treatment which they might have given to him. Then the Master of the Rolls continues: "In the former case there is, of course, a remedy in contract, while in the latter the only remedy is in tort, but in each case the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once this is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person whether a servant or agent, to discharge it on his behalf, and this is equally true whether or not the obligation involves the use of skill. It is also true that, if the obligation is undertaken by a corporation, or a body of trustees or governors, they cannot escape liability for its breach, any more than can an individual, and it is no answer to say that the obligation is one which on the face of it they could never perform themselves. Nor can it make any difference that the obligation is assumed gratuitously by a person, body or corporation which does not act for profit: *Mersey Docks Trustees v. Gibbs* (1). Once the extent of the obligation is determined the ordinary principles of liability for the acts of servants or agents must be applied.

"The question which presents itself in the present case may, therefore, be formulated as follows: When a patient seeking free advice and treatment such as that given to the infant plaintiff knocks at the door of the defendant's hospital, what is he entitled to expect? He will find an organization which comprises consulting physicians and surgeons, presumably also house physicians and surgeons, a staff of nurses, equipment for administering Grenz ray treatment and a radiographer, Mead, employed to give that treatment. So far as consulting physicians and surgeons are concerned, clearly the nature of their work and the relationship in which they stand to the defendants precludes the drawing of an inference that the defendants undertake responsibility for their negligent acts. The same may be true of the house

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"physicians and surgeons, but their case is not relevant to the present inquiry and I say nothing about it." Therefore, the position of Miss Knight as a resident house surgeon is one that is still expressly left open by that case for decision. MacKinnon L.J., dealt with the case, it seems to me, upon the same broad principle, *qui facit per alium facit per se*, and he gives certain examples of the legal principles to be followed. It is, however, when one comes to the judgment of Lord Goddard (then Goddard L.J.) that one finds a return by him to the test of whether the services which are rendered and which are negligently rendered are services pursuant to a contract of service or a contract for services. I think that the majority opinions of the Master of the Rolls and MacKinnon L.J. go to show that if a county council exercising its powers under the Public Health Act, 1936, manages and controls a hospital undertaking the obligation of affording to patients, who resort to the hospital, nursing, accommodation and treatment, the fact that they employ a professional person to perform some of those obligations does not divest them of their responsibility in law. If such a professional person so employed by them is negligent, the observations of the Master of the Rolls which I have quoted seem to me to support that proposition. Here, as a part of the amenities of the hospital offered to a person resorting to it for treatment and accommodation, was the presence at all times on the premises of a resident medical officer. Treatment was given by a resident medical officer, and her acts done in the course of treatment of the patient are, in my view, acts for which the hospital is responsible, following, I think, in arriving at that conclusion, the ratio decidendi in *Gold v. Essex County Council* (1), although it was expressly stated obiter in that case that a consulting surgeon coming to a hospital is in another category.

Mr. Hunt was not in precisely the same situation with regard to this hospital as is a consulting surgeon who is on the staff of one of the teaching hospitals, or of his own hospital, or, indeed, on the staff of an ordinary hospital as a consulting surgeon. One knows that a consulting surgeon goes to such hospitals where he is on the staff as a consultant to perform operations, voluntarily giving services to the hospital, and, of course, he can refuse to perform an operation, and he can come as often as he likes or as seldom as he likes, although, of course, for the convenience of running such a hospital,

(1) [1942] 2 K. B. 293.

he does in truth, have his days for going and operating which are known and to which he adheres ; but he does not do any of that contractually ; he does it as a matter of agreement to which he honourably adheres. It may be that the situation of such a surgeon can be distinguished from the situation of qualified persons employed and necessarily employed to fulfil the obligation undertaken by the hospital to give the necessary treatment to a patient. As MacKinnon L.J., points out, a ship-owner none the less remains liable for the negligent navigation of one of his ships, notwithstanding that the navigation was performed by a fully-qualified master mariner, and the ship owner must necessarily employ such a fully-certified person. My difficulty in this case is that Mr. Hunt signed this form similar to the one which Miss Knight signed, and signed a form which spoke of the capacity in which he was employed as that of a temporary part-time person taking the appointment of an employee on the staff of the county council, and apparently undertaking specifically to attend upon Tuesday, three hours, and Friday, four hours, and to be on call Tuesdays, Thursdays, and alternate Fridays and week-ends, at an annual basic cash salary at the date of appointment of 500*l.* per annum, without, apparently, any prospect of rising by any increments, because that part of the form is left blank. I am in considerable doubt whether (though, as in Miss Knight's case, I am sure there was no intention on Mr. Hunt's part that it should be so) that should represent the written terms of a contract between them ; none the less, from his own answers to interrogatories I think it is clear that those were the terms of an employment, and I am very doubtful whether the hospital is not in the circumstances also vicariously responsible for what Mr. Hunt may, as I have held, have omitted in the way of reasonable care in this case.

On the whole, however, I think that Mr. Hunt's position was one where, if the test to be applied is whether the authorities could in any way control how he was to perform his duties, they certainly could not. I do not think they could even say what he should or should not do. I think he had only to say " I will not do this operation," for them to have to put up with it. I do not think they could possibly have said that they could order him to do an operation which he said he would not do. I do not think they could say what he was to do, and I am certain that they could not say how he should do it. The same is not true of Miss Knight. I think to a very great extent the hospital authorities could say how she should perform her work,

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as, indeed, they did under the regulations which they, at any rate, intended should be binding upon Miss Knight, though in the circumstances those regulations had not been brought to Miss Knight's attention in a way which would make them binding. In the circumstances, while I think that the hospital was vicariously responsible for Miss Knight's acts of negligence or negligent omissions in the course of the performance of her duties, the same does not apply to Mr. Hunt.

It is said that the pharmacist was negligent. He certainly and most clearly was. It has been called to my attention, in the course of the evidence, not only that this was a dangerous drug for which any pharmacist should expect and would expect a prescription in writing from a fully-qualified medical officer, but it has also been called to my attention that there is evidence that in the British Pharmacopœia every dispenser is warned that when an order is received, that means even when in writing signed by a qualified medical officer, requiring him to dispense an unusually large quantity of a dangerous or poisonous drug, before doing it he should take steps to verify that there is no mistake about what is being ordered. This pharmacist took an order by word of mouth for an unheard of dosage for an injection of cocaine and adrenalin, and made it up. He knew that it was for an operation, and he knew that it was for injection. He made it into a sterile solution and put it into a flask suitable for immediate use in the course of an operation; he took no step whatever to insist upon a qualified person initialling the order, he made no check and he did not even send up the flask when made up with any note calling special attention to it or asking that Mr. Hunt's attention should be specially called to it. He disregarded every sort of plain and ordinary safeguard for the making up of dangerous drugs.

At a very early stage in this case Mr. Paget asked for leave to amend his statement of claim by including a charge that the hospital was also responsible for the negligence of the pharmacist. Mr. Berryman objected to the amendment being made so late, and he indicated that if such an amendment were made he would say that the answer was contained in s. 21 of The Limitation Act, 1939 (Limitation of actions against public authorities), because it would be alleging a new cause of action. What I did was finally to say that I should allow the amendment, giving any adjournment that Mr. Berryman might require so that he could reasonably meet the situation so far as that detail

of evidence was concerned, so as to enable him to have the proof of the pharmacist taken and to prepare himself with what the pharmacist had to say and to know what the hospital's case was so far as the pharmacist's position was concerned. Mr. Berryman did not require any adjournment, and so the matter went on. I confess, at once, that I had not present to my mind what the Court of Appeal had said in *Marshall v. London Passenger Transport Board* (1) because, if I had had it present to my mind at that moment, before allowing the amendment, I should have heard argument on whether such a case was an allegation of an entirely new cause of action, the inclusion of which in the action by way of amendment would defeat the right of the county council to plead s. 21, as barring such a cause of action. The actual observations of the Court of Appeal were not present to my mind. The way I decided to deal with the matter as I then thought it could be dealt with, without the authorities being cited to me, was to allow the amendment, and let the defendants plead s. 21, and then finally if necessary, to test the question as to whether or not s. 21 did apply in the circumstances and to reserve all questions as to the propriety of the amendment. I took the view then, at first glance, that this amendment was not the same thing as alleging a new cause of action. Certain cases were cited to me. *Marshall v. London Passenger Transport Board* (1) was a very clear case of an amendment being something which was a completely different and new cause of action. So also was *Batting v. London Passenger Transport Board* (2). In each of those cases a transport authority in the original action was alleged negligently to have managed and controlled a vehicle so that the plaintiff was injured. The amendment that was sought to be made was not to allege that there was, in addition to the negligence that had already been alleged on the part of one servant, negligence of another servant which contributed to bring about the mishap of which the plaintiff complained, but that in addition to the negligent management the transport authority had been guilty of a breach of a statutory obligation and duty—a totally different cause.

In this case the cause of action relied upon by the plaintiff and which is upon the writ is that the death of the plaintiff's husband was the result of the negligence of the defendants in and about the conduct of their hospital. That is the negligence alleged—negligence in and about the conduct of a hospital.

(1) [1936] 3 All. E. R. 83.

(2) [1941] 1 All. E. R. 228.

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In the statement of claim, what is elaborated is by way of particulars of that negligence. As particulars of the negligence, the persons for whom it is alleged that the hospital is vicariously responsible are named. It is said, firstly, with regard to Mr. Hunt, and, secondly, with regard to Miss Knight, and, in addition, it is alleged that there was a defective and negligent system. But the allegations of Miss Knight's negligence and Mr. Hunt's negligence are only particulars of the cause of action, which is negligence in the management and control of the hospital. The alleged negligence of the pharmacist was not a new cause of action; it was a new particular: that is all it is. That was the view which I took when the matter was first mentioned to me, and it is the view which I have taken on further consideration. Therefore, I think that I should have allowed the amendment if the argument about the applicability of s. 21 had been pressed as a matter which I should consider and decide before allowing the amendment, and I think that the hospital has no answer to the outstanding negligence of the pharmacist.

In those circumstances, there must be judgment for the plaintiff against each of the defendants. Each of the defendants is responsible, because each was guilty of what the law calls negligence, that is to say, a failure to exercise reasonable skill and care in the treatment of the patient, Collins, with the result that Collins died. There must be judgment for the plaintiff for 2,500*l*.

Montague Berryman K.C. and *Everett* for the county council. The defendant hospital authority have made a claim for contribution against their co-defendant, Alan Henderson Hunt under s. 6, sub-s. 1 (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935 (1). In *Smith v. Bray (Wickham*

(1) Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6:—" (1.) Where damage is suffered by any person as a result of a tort (whether a crime or not . . .) (c) any tortfeasor liable in respect of that damage may receive contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise . . . "

" (2.) In any proceedings for

" contribution under this section
" the amount of the contribution
" recoverable from any person
" shall be such as may be found by
" the court to be just and equitable
" having regard to the extent of
" that person's responsibility for
" the damage; and the court shall
" have power to exempt any person
" from liability to make con-
" tribution, or to direct that the
" contribution to be recovered
" from any person shall amount
" to a complete indemnity."

third party) (1) your Lordship held that "the distribution of the responsibility is to be regarded from the point of view of causation and is not to be dependent on the respective degree of negligence of the parties," as the proposition is phrased in Salmond on the Law of Torts (10th ed., at p. 78). (The observations of Greer L.J. in *The Eurymedon* (2) on the *Davies v. Mann* (3) rule were referred to.) None of the earlier acts of negligence would have caused the death of the patient, if Mr. Hunt had asked the question at the relevant time: "Is this the procaine anæsthetic which I ordered?"

Havers K.C. and *H. C. Dickens* for *A. H. Hunt*. Winfield writes in his textbook on the Law of Tort (3rd ed., 1946) at p. 168: "The Act also recognizes that degrees of iniquity in wrong-doing committed by several persons may vary considerably, for it empowers the court in any proceedings for contribution to award a sum which it regards as 'just and equitable' having regard to the defendant's responsibility for the damage; and it may even exempt the defendant from any liability to contribute, or may direct that the contribution recoverable shall amount to a complete indemnity" (see s. 6, sub-s. 2, of the Act). The word "responsibility" involves the idea of culpability—the extent of that person's "responsibility"—in view of the negligence—"for the damage." The greater extent of negligence was that of Miss Knight, and the last act of negligence was that of Miss Knight, in that the symptoms of convulsions of the patient did not bring to her mind that cocaine, of the toxicity of which she was aware of, might be the cause of that symptom. She had the final opportunity of bringing to the notice of the operating surgeon the fact that a lethal dose had been injected into the patient, a knowledge of which, even then, might have saved the patient's life.

HILBERY J. I have found great difficulty in the construction of the Law Reform (Married Women and Tortfeasors) Act 1935, s. 6, sub-ss. 1 (c) and 2. In proceedings for contribution by one tortfeasor against another, what is the guiding principle laid down by the statute for the court in arriving at its assessments. By s. 6, sub-s. 2, "the amount of the contribution recoverable from any person shall be such as may be found

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(1) (1939) 56 T. L. R. 200.

(3) (1842) 10 M. & W. 546.

(2) [1938] P. 41, 49-50.

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"by the court to be just and equitable having regard to the
• "extent of that person's responsibility for the damage;
"" If the wording of that sub-section had stopped at
the word "equitable" and the semi-colon had occurred there,
I should have thought that what was plainly intended was that
the court was to have the fullest discretion and to distribute
the contribution to the damages between persons whose
several acts had brought about the damage according
to what the court thought were their degrees of cul-
pability. But the sub-section does not stop at the words
"just and equitable" but continues with the govern-
ing words "having regard to the extent of that person's
"responsibility for the damage." In *Smith v. Bray* (*Wickham
third party*) (1) my attention was called to this difficulty, and
I expressed the view that it seemed to me that whereas it
would be comparatively easy to distribute the damages accord-
ing to the relative degrees of negligence on the part of the tort-
feasors, it was quite a different matter if these qualifying words
were to be given their full effect and the court had to decide to
what extent the negligence of the one party or the other was
causal in bringing about the damage. The words "having regard
"to the extent of that person's responsibility for the damage,"
certainly seem to indicate that the extent of the responsibility
for the damage is to be the guiding principle of the assessment.
It is difficult to conceive how anything other than causal acts
resulting in the damage can show the extent of a person's
responsibility for the damage.

In this case, difficult as it is, I think that right up to the very
moment of the injection (because that was the moment which,
on Mr. Hunt's own evidence, he regarded as the appropriate
time to make the test) and even after that moment there was
negligence on the part of the hospital, as I have indicated.
At that moment there was negligence, and subsequent to that
moment there was negligence. At the same time, Mr. Hunt
has accepted the view that he had a responsibility to check—
to see whether what was injected was what he had ordered;
and on his own showing he had selected a late moment, none
the less a moment which would have been perfectly effective,
to make the necessary inquiry, if in fact I had been able to find
that he had then made it. I am unable, however, to make the
assessments otherwise than that the two tortfeasors shared
equally the responsibility which was there up to the last

(1) 56 T. L. R. 200.

moment. I think the contribution of Mr. Hunt ought to be one half and I make that order on both parties' application.

*Judgment for plaintiff.
Order that each defendant contribute
one-half of the damages.*

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Solicitors for plaintiff: *E. W. Parkes.*

Solicitors for the county council: *Berrymans.*

Solicitors for A. H. Hunt: *Hempsons.*

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Pension—Members of tribunal not in agreement—Claim rejected by majority—Appeal—Pensions Appeal Tribunals Act, 1943 (6 & 7 Geo. 6, c. 39).

A Pensions Appeal Tribunal can only reject a claim for a pension if its members are unanimous. In case of disagreement the proper course is to refer the claim to another tribunal.

PENSION APPEALS.

The applicants, Francis Edwin Brain and Reginald Wilkes, respectively applied for pensions, in respect of disability due to war service. In each case the tribunal, its members being unable to agree, rejected the claim by a majority decision. The applicants appealed, and it was contended on their behalf that (1.) there was no evidence to support the majority view, and (2.) a tribunal could only reject a claim if its members were unanimous in taking that view.

F. R. McQuown for Brain.

G. H. Crispin for Wilkes.

H. L. Parker for Minister of Pensions.

Cur. adv. vult.

May 5. DENNING J. In each of these cases the tribunal by a majority (the chairman dissenting) decided against the claimant. It was submitted to me in each case that there was no evidence to support the view of the majority, but I hold that

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there was. The point remains whether, in order to reject a claim, the members of the tribunal must be unanimous or whether a majority vote will suffice. That point was raised, but not decided, by the Court of Session in *Re Fourteen Appeals* (1). The statute contains no express provision on the matter, and it must be decided on general considerations, having regard to the constitution of the tribunal and the matters which it has to decide.

The rule whereby decisions are reached according to a majority vote is firmly established in all cases where one body alone is competent to reach a decision. The very necessity of coming to a decision compels recourse to a majority vote, for in that way alone can finality be achieved. This sacrifice to necessity involves, however, the introduction of a considerable margin of error. When a decision is not unanimous, but only reached by a narrow majority, it is almost as likely to be wrong as it is to be right. Its correctness depends more on the quality of the reasoning on either side than on the numbers. It is not satisfactory for the rights of parties to be finally determined by a tribunal of first instance with such a risk of error. The law has therefore devised two methods of avoiding or reducing the risk. One method is not to accept a majority vote at all, but require every decision to be unanimous, and, in default, let the matter be re-heard with different persons sitting on the tribunal. That is the method adopted in trial by jury. Ever since 1367 the law has required that the decision of a jury should be unanimous. If they cannot agree, even if one only dissents, the case must be tried before another jury. The other method is to accept a majority vote as a valid basis of decision but to give a right of appeal. That is the method adopted in trials by magistrates. They have always been able to decide by a majority vote, but there is by statute a right of appeal to quarter sessions. In recent statutes creating special tribunals the two methods are sometimes found in combination. A right of appeal is given from a majority decision without leave, but only by leave from a unanimous decision. In the case of some other tribunals, however, neither method is applicable, and the only conclusion may be that the legislature intended to authorize a decision by majority vote with the risk of error that that entails.

A pensions appeal tribunal, despite its name, is a tribunal of first instance, to which is entrusted the final decision of questions

(1) Pensions Appeals Reports (Scottish) 461, 465.

of fact. There is an appeal by leave from its decision on a point of law but none from its decision on a question of fact. It is composed of three members, each of whom has special qualifications : and in nearly all cases it is their duty to give the claimant the benefit of any reasonable doubt. If all three are unanimous in rejecting a claim on the facts, their decision can be accepted with confidence. If two are in favour of rejecting the claim and one for allowing it, and that one holds his view so strongly as to enter an express dissent, it raises a reasonable doubt as to the validity of the view of the majority : and whilst I do not say that the view of the one dissentient should prevail (for that would give effect to a minority decision) the margin of error is so great as to make it unsafe to accept the view of the majority as final. The claimant (who has no possibility of appeal on the facts) should have an opportunity of going before another tribunal. There are a considerable number of pensions appeal tribunals and whenever any difficulty arises in a part-heard case on account of illness or retirement, it is the usual and proper practice for the case to be heard afresh before another tribunal. So, also, in the case of disagreement, there is no difficulty in the case going before another tribunal.

My conclusion, therefore, is that a claim to a pension is not to be rejected unless the tribunal is unanimous in rejecting it. In the case of disagreement, the claim must go before another tribunal. I must add a word however, as to what unanimity entails, and for this I draw on the practice under the jury system. If the need for unanimity led to many abortive trials it would detract much from the value of that system : but that is not what happens. The cases in which a jury disagree are very few, owing to the commonsense way in which the rule as to unanimity is applied. It does sometimes happen that a jury return and ask if they need be unanimous ; or say they cannot agree ; or that one or two do not agree with the rest. In such a case the judge directs them that they must be unanimous, but he usually goes on to explain what unanimity means on the lines of the direction of Finlay J. in *Rex v. Klein* (1). He reminds them that it is most important that they should agree if it is possible to do so ; that, with a view to agreeing, there must inevitably be some give and take ; that, if any member should find himself in a small minority and disposed to differ from the rest, he should consider the matter carefully, weigh the reasons for and against his view, and

(1) Feb. 9, 1932 (unreported).

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remember that he may be wrong ; that if, on so doing, he can honestly bring himself to concur in the view of the majority, albeit hesitatingly or reluctantly, he should do so ; but if he cannot do so, consistently with the oath he has taken, and he cannot bring the others round to his point of view, then it is his duty to differ, and, for want of agreement, there will be no verdict.

I remit these two cases, therefore, for a fresh hearing before another tribunal. The claimants will be at liberty to call fresh evidence if they desire so to do,

Solicitors for Brain : *Martyns & Gane, for Bickley & Lynex, Birmingham.*

Solicitors for Wilkes : *Culross & Trelawney.*

Solicitor for Minister of Pensions : *Treasury Solicitor.*

A. W. G.

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Henn-Collins J.

MARTIN v. LONDON COUNTY COUNCIL.

Bailment—Hospital—Patient brought to hospital—Jewellery handed over for custody—Reception order under Lunacy Act, 1890—Maintenance paid as for rate-aided patient—Degree of care for custody of jewellery bailed—Managers of hospital, bailees for reward—Assessment of value of jewellery—Amount for purchase tax included.

The plaintiff was brought as a patient to a hospital by the relieving officer for the district, where a reception order with regard to her was made under the Lunacy Act, 1890, and her estate became liable for her cost of maintenance at the appropriate amount applicable to rate-aided patients. On her entry, hospital officials took charge of two pieces of jewellery and a gold cigarette case which she brought with her to the hospital. They were subsequently stolen by a thief who broke into the room in which they were kept. In an action by the Official Solicitor, on her behalf, against the managers of the hospital for negligence as bailees :—

Held, that the defendants were bailees for reward, and it being found that the articles were lost owing to their having failed to exercise the care required of bailees for reward, were liable to pay their value as damages,

Held, also, that in assessing the value of the lost articles the amount of purchase tax must be included, since a duplicate could not at the material time be purchased retail without payment of purchase tax.

ACTION.

On October 27, 1943, the plaintiff, Louise Kitty Martin,

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accompanied by a relieving officer for the district and her sister, Miss Ruth Martin, arrived as a patient at St. Pancras Borough Hospital which, by virtue of their statutory powers, the defendants managed and controlled. On October 29, 1943, a reception order under the Lunacy Act, 1890, was made with regard to the plaintiff and on November 2, 1943, she was removed from St. Pancras Borough Hospital to Friern Hospital, New Southgate, London, N.11, where at all material times she remained a patient. Her cost of maintenance at the appropriate amount applicable to rate-aided patients from October 27 1943, to March 27, 1944, was 42*l.* 18*s.* 5*d.*, a sum which was discharged by 2*l.* 16*s.* 1*d.* found on the plaintiff and 40*l.* 2*s.* 4*d.* paid on November 16, 1945, by the Official Solicitor to the Supreme Court, who had been appointed receiver of the plaintiff's estate on February 11, 1944.

On entering the hospital the plaintiff was put to bed and nurses took charge of : (1.) an emerald cut diamond ring with baton diamond shoulders ; (2.) a diamond and baton diamond clip brooch ; (3.) a gold cigarette case and other articles. These chattels were listed in the ward-book being described as "one dress clip, one dress ring and one gold cigarette case," and were packed in a property envelope with the other articles and on October 29, 1943, placed in the ward-sister's cupboard. On November 1, 1943, they were taken by the ward-sister to the steward's office where they were checked, listed in the patient's property register as "one dress clip, one dress "ring and Y.M. cigarette case," and fastened with the other articles in the property envelope. The envelope was then removed from the steward's office and placed in a pigeon hole in room 61, which was kept locked. The envelope was not sent to Friern Hospital when the plaintiff was removed there on November 2, 1943, or subsequently. On December 12, 1943, the plaintiff's sister, Miss Ruth Martin, wrote a letter to the clerk and steward of the hospital, asking him to confirm the contents of her sister's handbag, stating that they included a diamond ring and clip and asking for information as to where the property was deposited, in case of war damage. No reply was sent to this letter. About February, 1944, the envelope containing the plaintiff's property was removed from room 61 to room 57B and put on the floor in a row of similar envelopes. This room was also kept locked. On March 21, 1944, it was discovered that at some time between March 9 and 21, room 57B had been broken into by a person scaling the external

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wall and forcing an entry through a window. The envelope containing the plaintiff's property was missing. The Official Solicitor on May 10, 1944, demanded that the goods should be handed over to him and was then informed that they had been stolen.

The plaintiff now by the Official Solicitor as her next friend, claimed the return of the two pieces of jewellery and the gold cigarette case or their value and damages for their detention ; alternatively, damages for their conversion ; and alternatively, damages for negligence and breach of duty as bailees. At the trial the claims for detinue and conversion were abandoned. The defendants denied negligence.

Holroyd Pearce K.C. and *R. F. Ormrod* for plaintiff.

The defendants were not gratuitous bailees. The amount charged to rate-aided patients under the Lunacy Act, 1890, is in respect of their maintenance and expenses. A boarding-housekeeper is a bailee for reward in respect of the luggage brought in by his lodgers. *Dansey v. Richardson* (1) and *Scarborough v. Cosgrove* (2). The payment, whether made to an innkeeper, a boarding-housekeeper or the manager of a hospital, is in respect of the accommodation, not only of the guest or patient but of that for his goods. The defendants, therefore, were bailees for reward and were under an obligation to the patient to take reasonable care for the due security and proper re-delivery of her goods. The goods being missing, the defendants must pay their value—their replacement value—which includes purchase tax.

Sir Valentine Holmes K.C. and *Leon Maclaren* for defendants. The only payment required for the patient was that of maintenance. The defendants, therefore were gratuitous bailees and are only liable in the case of gross negligence. Not only was there no gross negligence, there was no negligence on the part of the defendants who took every care of the goods. There is no authority for the inclusion of purchase tax in the damages.

HENN-COLLINS J. Three questions, I think, arise for decision in this case : (1.) what degree of care were the defendants bound to exercise in respect of the plaintiff's property ? (2.) did they exercise that degree of care ? and (3.), if not, to what damages is the plaintiff entitled ? The first question depends primarily on whether the defendants can properly be described as gratuitous bailees or whether they were in a higher category

(1) (1854) 3 E. & B. 144, 164. (2) [1905] 2 K. B. 805.

and so bound to exercise a higher degree of care. If they were gratuitous bailees, it is clear that they would only be liable for that degree of negligence which would earn the epithet of "gross." I do not know whether that degree of negligence can be accurately defined, but it must be some sort of carelessness which would appear to the plain man of common sense as being gross. But if the defendants were not gratuitous bailees, but were bailees for reward, they would be bound to take a higher degree of care, again not, it may be, susceptible of accurate definition, but a degree of care appropriate to the circumstances in which the bailee is rewarded for the pains to which he is put in keeping the articles bailed.

The defendants, in my opinion, were not gratuitous bailees, but fall into the second category. They were under a statutory duty to receive the plaintiff into their institution and it was a necessary precaution on their part for them to take possession of all the property which the plaintiff brought with her when she came to the hospital on October 27, 1943. The burden of undertaking this task was in that sense put upon the defendants; but they are in a position to recover all the expenses to which they have been put and they, no doubt, include the expense of keeping safely the plaintiff's property. The practice at the hospital was to make entries in their books of the items of property belonging to a patient which he brought with him to the hospital. That necessitated a certain amount of clerical work and the use of stationery and the property was put into an envelope appropriate for the purpose—all this, I have no doubt, was part of the expense of running the hospital. A gratuitous bailee receives nothing for his pains; he gets no recompense of any sort. If a bailee is to be compensated for his pains, then he cannot be styled a gratuitous bailee and he is bound to exercise such a degree of care at least, as men of common prudence would take in regard to such a class of article as that which falls into the possession of the bailee.

What degree of care does that indicate in the circumstances of this case? The defendants themselves have provided me with a measure of that care. Had they realized at the time when the plaintiff brought them to the hospital that these articles were of anything like the value of which in fact they were, these two articles of jewellery and the cigarette case would have been put into a safe. If they had been put into a safe, they would not have been stolen in the way in which they were stolen. No doubt, the exigencies of the war and the result of

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enemy action at the hospital brought it about that the envelopes in which it was the practice to slip the property, which was confided by the patients to the care of the hospital officials, were stacked in a room not originally designed for the purpose and not particularly appropriate—though it may have been the best they had available—subject always to the possibility of putting articles of recognized and considerable value into a safe as being less likely to offer opportunity to pilferers and thieves. That assumes that the defendants by their servants knew that these articles were of value. It seems to me that the officials at the hospital were wrong in assuming, as seems to have been the practice, that articles committed to their care by patients were of trumpery value. They receive into their institution persons of all classes, from the higher as well as from the lower income groups, and there can be no presumption that the property brought with them by patients is not of value. If the officials chose to treat such articles as being worthless or as offering little temptation to thieves, that is a risk which they take upon themselves. They should err rather on the side of safety, seeing that they are taking possession of other people's property, which has ultimately to be returned or for which they must render an account. I do not mean that they should treat every article handed to them by patients as of great value in that it offers temptation to thieves. Much of such property obviously is of little value and this they can deal with as they please. What is a reasonable degree of care in such a case is not reasonable where the articles are of value which offer or may offer temptation to a thief. It is, however, not necessary to decide this case on generalities. By a letter, dated December 12, 1943, some months before the theft of these articles, the plaintiff's sister who so described herself in the letter, asked for confirmation as to the contents of her sister's handbag when she entered the hospital and giving some intimation as to its contents, since she wrote: "I should be obliged" to you for a reply as soon as possible. Also diamond ring and "clip, etc. Would you please let me know where these things" are deposited? In case of war damage, etc." The writer of that letter, it is obvious, thought—to put it no higher—that the ring and clip contained real diamonds and were of value, because she wanted to guard against loss by reason of war damage, etc. To that letter no answer was vouchsafed. The view taken was, apparently, that it was not the practice of the hospital to give receipts in respect of the property of which charge was taken and that, this being so, the letter did not

require an answer. But this letter, if it had penetrated to the right quarter, was a plain intimation that it would be, at any rate, worth while to investigate and see whether the plaintiff's articles were not of trumpery value, but consisted of diamonds. It seems to me that there must have been some failure in the office or administration of the hospital which prevented that notice that the plaintiff's articles of jewellery were diamonds or might be considered to be diamonds, reaching the proper quarter. That information failed to connect, with the result that these three articles, in respect of which the plaintiff now sues, were stored along with hundreds of other articles in envelopes stacked on the floor in a room which an expert burglar according to the police evidence, given sufficient agility and perseverance, would have no difficulty in entering. I am satisfied that a thief did enter that room in which the plaintiff's jewels were stored through a window which was insufficiently secured and that this jewellery was taken by him through that window. In these circumstances I think that the defendants are liable.

As to damages, there is this difficult question about purchase tax. It has been suggested for the defendants, though I do not think very strongly, that purchase tax must be disregarded. This contention must, I think, be wrong. You could not, at the material time, buy these articles retail without paying purchase tax, which has, in effect, been added in that sense to the intrinsic value of the articles. A person who bought such an article before purchase tax came into force may even feel flattered to think that its value has been increased by the amount of the tax, merely by the subsequent imposition of the tax, which he has not paid. But should he be deprived of the article and seek to replace it now, he would find that this accretion in value was an unfortunate reality. I must, therefore, take purchase tax into account. Taking the value of the articles as at May 10, 1944, the date agreed on by the parties, I assess the value of the ring at 700*l.*, and of the clip at 900*l.*, which with the agreed value of the gold cigarette case of 40*l.* makes 1,640*l.*, for which sum I give judgment for the plaintiff.

Judgment for the plaintiff.

Solicitor for the plaintiff : *The Official Solicitor to the Supreme Court.*

Solicitor for the defendants : *J. R. Howard Roberts.*

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Apr. 25.

Lord Goddard
C.J.,
Atkinson and
Oliver JJ.

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Ex parte BARNSELY CORPORATION.

Emergency legislation—War service—Reinstatement in civil employment—Refusal by former employer to employ—Application to reinstatement committee—Appeal to umpire—Power of umpire to decide facts on which jurisdiction depends—Certiorari—Reinstatement in Civil Employment Act, 1944 (7 & 8 Geo. 6, c. 15), ss. 9, sub-ss. 1, 2, s. 10, sub-s. 1.

By s. 9, sub-ss. 1, 2, of the Reinstatement in Civil Employment Act, 1944, a person claiming to be a person to whom the Act applies, and to have rights under the Act which have been denied him by reason of the failure of his former employer to take him into his employment on the expiration of his war service, may apply to a reinstatement committee for the determination of any question relating to his rights under the Act, and the reinstatement committee shall determine that question.

By s. 10, sub-ss. 1, 2, an appeal may be brought to an umpire or a deputy umpire from an order by a reinstatement committee and on such appeal the umpire may make any order which a reinstatement committee has power to make and his decision shall be final. On an application for an order of certiorari to bring up and quash an order, made on appeal, by a deputy umpire directing the reinstatement of an applicant by her former employers, it was sought to contend that the order of the deputy umpire was made without jurisdiction by reason of the fact that his decision on the preliminary questions which formed the basis of his jurisdiction to decide whether there had been default by the former employers of the applicant, were not based on reasonable grounds and were therefore a proper subject for certiorari:—

Held, that ss. 9 and 10 of the Act gave jurisdiction to the reinstatement committee and, therefore, to the umpire, in the latter case without appeal, to decide the preliminary questions whether the applicant had rights under the Act and whether the persons against whom the application was made were the former employers of the applicant, and, consequently, that the decision of the deputy umpire on those matters, could not be questioned in proceedings for certiorari.

APPLICATION for order of certiorari.

From September, 1940 until December 14, 1941, an applicant for reinstatement under the Reinstatement in Civil Employment Act, 1944, was employed by the Barnsley Corporation as a telephone switchboard operator. On December 15, 1941, on her own application, she entered the civil defence service as a whole time paid worker and continued therein until

October 21, 1942. On October 28 of that year she joined the Women's Royal Naval Service. She left that service on November 25, 1945 and on January 4, 1946 she applied to the Barnsley Corporation for employment. Her application was refused and thereupon, in pursuance of the provisions of s. 9, sub-s. 2, of the Reinstatement in Civil Employment Act, 1944 (1), she applied to the Barnsley Reinstatement Committee for re-employment with the Barnsley Corporation as her former employers. Her application was refused on the ground that it was not made within the prescribed period of five weeks after the termination of her war service with the Women's Royal Naval Service. She appealed to an umpire pursuant to the provisions of s. 10, sub-s. 2, of the Act, and it was contended by the Barnsley Corporation before the deputy umpire by whom the appeal was heard, that the corporation were not the former employers of the applicant by reason of the intervention of her period of service with the civil defence service between her employment by the corporation and her joining the Women's Royal Naval Service. The deputy umpire held that the applicant had reasonable grounds for the delay in making her application for reinstatement; that the corporation were her former employers within the meaning of

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(1) Reinstatement in Civil Employment Act, 1944, s. 1, sub-s. 1 :
" Subject to the provisions of this
" Act, where a person to whom this
" Act applies whose war service
" ends after the commencement of
" this Act makes an application to
" his former employer to be taken
" into his employment, the former
" employer shall . . . be under an
" obligation to take the applicant
" into his employment . . . "

Section 9, sub-s. 1 : " A person
" who is or claims to be a person
" to whom this Act applies and
" claims that he has rights under
" this Act which are being or have
" been denied him, may, within
" the prescribed time, apply to a
" Reinstatement Committee for the
" determination of any question
" relating to his rights, if any, under
" this Act, and the committee
" shall determine that question."

Sub-section 2 : " Where the
" committee are satisfied that
" default has been made by the
" former employer of the applicant
" in the discharge of his obligations
" under this Act, the committee
" may make either or both of the
" following orders according as is
" in their opinion appropriate . . . "

Section 10, sub-s. 1 : " An appeal
" may, within the prescribed time,
" be brought from any deter-
" mination or order of a Reinstatement
" Committee . . . to the
" umpire or deputy umpire . . . "

Sub-section 2 : " On any such
" appeal, the umpire or deputy
" umpire may make any deter-
" mination or order which a Re-
" instatement Committee might
" make under the provisions of
" this Act or may dismiss
" the appeal, and his decision
" shall be final ; . . . "

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s. 1, sub-s. 1, of the Act, and that there had been default by them in the discharge of their obligations under the Act. He accordingly made an order for the reinstatement of the applicant in her employment.

The Barnesley Corporation applied for an order of certiorari to bring up and quash the order of the deputy umpire on the ground that it was made without jurisdiction.

Paull K.C. and *Ramsay Willis* for the Barnesley Corporation. Certiorari will lie in this case since the deputy umpire had no jurisdiction finally to decide the preliminary questions which formed the basis of his jurisdiction to decide whether there had been default by the corporation in the discharge of their obligations under the Reinstatement in Civil Employment Act, 1944. The argument for the appellant's can be put in the words of Lord Esher M.R. in *Reg. v. Commissioners for Special Purposes of the Income Tax* (1). In that case, after stating that a court cannot give itself jurisdiction by a wrong decision on the facts, the Master of the Rolls said that two categories of cases existed. The first was that in which the legislature said that if a certain state of facts existed and was shown to the tribunal to exist, before it proceeded to do certain things, it should have jurisdiction to do such things and not otherwise. In such a case it was not for the tribunal conclusively to decide whether the state of facts existed, and if it exercised jurisdiction without the existence of the facts, its decision might be questioned and it might be held that it had acted without jurisdiction. The second category related to cases in which the tribunal has been entrusted with a jurisdiction which included the jurisdiction to determine the preliminary state of facts, as well as the jurisdiction, on finding that the facts existed, to proceed further or to do something more. The present case falls within the first of these two categories, since it is submitted that no jurisdiction is given to an umpire on hearing an appeal conclusively to decide the preliminary questions whether the applicant is a person having rights under the Act and whether the person against whom the application is made was the former employer of the applicant, which are the foundation of his jurisdiction to decide whether the former employer is in default. The words in s. 9, sub-s. 2, of the Act are "where the committee are satisfied that default has been made." That means satisfied on reasonable grounds.

(1) (1888) 21 Q. B. D. 313.

Although in the present case the language of s. 9, sub-s. 1, might appear to give the necessary jurisdiction, the use of the word "satisfied" in sub-s. 2 indicates that the legislature had in mind that the committee, or an umpire, must have reasonable grounds for their decision of the preliminary questions on which their jurisdiction to decide whether there had been default by the former employers depends. If, as it is desired to contend in the present case, the decision of the deputy umpire was not based on reasonable grounds it can be made the subject of certiorari. (They also referred to *Rex v. Bradford* (1).)

Sir Hartley Shawcross A.-G. and *Arthian Davies* for the respondent. The deputy umpire had jurisdiction to decide the preliminary facts on which his jurisdiction to decide the question of default was founded, and certiorari, therefore, will not lie. By s. 9, sub-s. 1, of the Act of 1944, a reinstatement committee and, therefore, an umpire on appeal, is given jurisdiction to decide any question relating to the rights of a person to whom the Act applies and, in the case of an umpire, his decision is final. The first question to be decided is who was the former employer of the applicant and full and exclusive jurisdiction is given to the reinstatement committee in the first instance to decide that question. Where jurisdiction exists, the superior court will not grant an order of certiorari on the ground that the court below has misconceived a point of law or because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of evidence or convicts without evidence (see *Halsbury's Laws of England*, 2nd ed., vol. 9, para. 1493). That statement of the law was approved by Greer L.J. in *Rex v. Minister of Health* (2) and by Lord Goddard C.J. in *Rex v. Furnished Houses Rent Tribunal for Paddington and St. Marylebone* (3). It follows that the findings by the deputy umpire on the questions of fact which he has been given jurisdiction to decide, cannot be questioned in proceedings for certiorari.

LORD GODDARD C.J. The question which it was desired to argue in this case and which, if it were open to the court to entertain it, would have involved the consideration of a large number of affidavits raising conflicting questions of fact, was whether the applicant was employed by the Barnsley Corpor-

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(1) [1908] 1 K. B. 365, 371.

(3) [1947] W. N. 103.

(2) [1939] 1 K. B. 232.

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ation, and whether she left that employment and entered the employment of the Crown on joining the civil defence service, or remained in the employment of the corporation until such time as she joined the Women's Royal Naval Service, so that she was entitled to the benefits and rights conferred by the Reinstatement in Civil Employment Act, 1944. The ground on which the application for an order of certiorari was made was that at the time when the applicant joined the Women's Royal Naval Service she was not an employee of the corporation, so that before the deputy umpire could make a reinstatement order in the applicant's favour, he would have to find that the corporation were her former employers. The question we have to decide is whether the deputy umpire was acting within his jurisdiction in making the order, because, if he was, then whether his decision was one which would commend itself to this court or not, is a matter of no moment since we are not sitting as a court of appeal from the deputy umpire. We are asked to grant an order of certiorari to bring up his order to be quashed, and certiorari can only be granted for that purpose in a case in which the tribunal has acted without jurisdiction or has exceeded its jurisdiction. [His Lordship read ss. 1, 9 and 10 of the Reinstatement in Civil Employment Act, 1944, and continued :] It is clear from these provisions that, in this case, the deputy umpire had the same powers as a reinstatement committee, including jurisdiction to decide all the questions that the committee had to decide and that no appeal lies from his decision. It is obvious, as it seems to me, that in any particular case brought before a reinstatement committee at least three questions may arise : (1.) whether the person applying to the committee is a person to whom the Act applies and whether he has any rights under the Act ; (2.) whether the person against whom the application is made was the applicant's employer at the relevant time ; and (3.) whether default has been made by the former employer of the applicant, the last question, of course, being unnecessary unless the two previous questions had been decided in the applicant's favour. It seems to me that under s. 9 of the Act it is clearly within the jurisdiction of the reinstatement committee, and consequently of the umpire, in considering the question of default, to decide the preliminary questions to which I have referred. It is well known that many Acts of Parliament have given the decision of certain matters to tribunals and bodies that are not the King's courts and in many

cases have taken away the right of the subject to come to those courts and challenge the decisions of such tribunals or bodies. In such cases all that this court can do is to consider whether or not the legislature has given the right to come to the court or not. A person who is aggrieved by the decision of such a tribunal as that to which I have referred can only apply to the court by way of certiorari to bring up the order and quash it if the tribunal has acted outside its jurisdiction.

If it is acting within its jurisdiction, it is now settled law that absence of evidence does not affect the jurisdiction of the tribunal to try the case, nor does a misdirection by the tribunal to itself in considering the evidence nor what might be held on appeal to be a wrong decision in point of law. None of these matters are grounds on which the court can grant certiorari. This question was dealt with recently in *Rex v. Minister of Health* (1) and was referred to by this court in the still more recent case *Rex v. Furnished Houses Rent Tribunal for Paddington and St. Marylebone* (2). In delivering the leading judgment in that case I quoted the passage in Greer L.J.'s judgment in *Rex v. Minister of Health* (1) where he said, quoting para. 1493 in vol. 9 of Halsbury's Laws of England, 2nd ed.: "Where
" the proceedings are regular on their face and the magistrates
" had jurisdiction, the superior court will not grant the writ of
" certiorari on the ground that the court below has mis-
" conceived a point of law. When the court below has juris-
" diction to decide a matter, it cannot be deemed to exceed or
" abuse its jurisdiction, merely because it incidentally mis-
" construes a statute, or admits illegal evidence, or rejects legal
" evidence, or misdirects itself as to the weight of the evidence,
" or convicts without evidence." The reason is that if Parliament has chosen to make the lower tribunal or body the absolute judges of the matters before it and to give no appeal, this court cannot interfere in a matter regarding which the lower court has been clothed with jurisdiction by Parliament. We were referred by Mr. Paull to *Regina v. The Commissioners for Special Purposes of the Income Tax* (3) in which Lord Esher M.R. drew a distinction between two classes of cases. He there said: "When an inferior court or tribunal
" or body, which has to exercise the power of deciding facts,
" is first established by Act of Parliament, the legislature
" has to consider what powers it will give that tribunal or

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(1) [1939] 1 K. B. 232.

(2) [1947] W. N. 103.

(3) 21 Q. B. D. 313, 319.

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" body. It may in effect say that, if a certain state of facts
 " exists and is shown to such tribunal or body to exist before it
 " proceeds to do certain things, it shall have jurisdiction to do
 " such things, but not otherwise. There it is not for them
 " conclusively to decide whether that state of facts exists,
 " and, if they exercise the jurisdiction without its existence,
 " what they do may be questioned, and it will be held that they
 " have acted without jurisdiction. But there is another state
 " of things which may exist. The legislature may entrust the
 " tribunal or body with a jurisdiction which includes the
 " jurisdiction to determine whether the preliminary state of
 " affairs exists, as well as the jurisdiction, on finding that it does
 " exist, to proceed further or do something more. When the
 " legislature are establishing such a tribunal or body to exist
 " with limited jurisdiction, they also have to consider, whatever
 " jurisdiction they give them, whether there shall be any
 " appeal from their decision, for otherwise there will be none.
 " In the second of the two cases I have mentioned it is an
 " erroneous application of the formula to say that the tribunal
 " cannot give themselves jurisdiction by wrongly deciding
 " certain facts to exist, because the legislature gave them
 " jurisdiction to determine all the facts, including the existence
 " of the preliminary facts on which the further exercise of their
 " jurisdiction depends." In other words Parliament may
 entrust the tribunal with the power of deciding whether or
 not they have jurisdiction, because they are empowered to
 decide the preliminary facts which alone will give it to them.
 It seems to me that that is what the tribunal has done in the
 present case, and that it was clearly given the right to do so by
 s. 9, sub-s. 1, of the Act. I cannot see that the matter could
 have been expressed in any clearer language than it is by the
 words of the section, and the deputy umpire, who, as I have
 already said, is in the same position as the reinstatement
 committee, in deciding that the applicant was a person who
 claimed to have rights under the Act ; that the Barnsley Cor-
 poration were her former employers and that default had been
 made by them, was deciding three things which he had been
 clothed with jurisdiction to decide by the terms of the section.
 For these reasons the application for certiorari must be refused.

ATKINSON J. I agree and have nothing to add.

OLIVER J. I agree.

Application refused.

Solicitors for the applicants : *Lewin, Gregory, Torr, Durnford & Co., for A. E. Gilfillan, Barnsley.*

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Solicitor for the respondent : *The Solicitor, Minister of Labour and National Service.*

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Factories—Woodworking machine—Guard incapable of proper adjustment—Employers' consequent breach of statutory duty—Workman's refusal to have guard safely adjusted—Contributory negligence—Liability—Apportionment of fault—Woodworking Machinery Regulations, 1922 (St. R. & O. 1922, No. 1196), regs. 10 (c), 21, 23—Law Reform (Contributory Negligence) Act, 1945 (8 & 9 Geo. 6, c. 28), s. 1, sub-s. 1.

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The defendant employers' woodworking machine was fitted with a guard incapable of being so adjusted as to comply with reg. 10 (c) of the Woodworking Machinery Regulations or "so adjusted as to enable the work to be carried on without unnecessary risk" in compliance with reg. 21. The plaintiff workman, on his side, refused to have the guard lowered even as far as it would go. The defendants' foreman pointed out to the plaintiff the risk which he was running, but agreed to an intermediate position for the guard by way of compromise. While the workman was working at the machine with the guard in that agreed position an accident occurred, injuring his hand, which could not have occurred had the guard been lowered to the fullest extent of which it was capable. The trial judge held the workman guilty of contributory negligence and refused to apportion any part of the blame on the employers under s. 1, sub-s. 1, of the Law Reform (Contributory Negligence) Act, 1945. On appeal by the plaintiff:—

Held, that the employers were in continuing breach of reg. 21 by having a guard incapable of proper adjustment fitted to the machine, and, further, through their foreman, by permitting the workman to work at the machine when the guard was not in the safest position possible to it; that that breach of statutory duty by the employers was an independent and contributory cause of the accident which the workman could set up against them; that the workman was not in breach of his duty under reg. 23 to maintain the guard in proper adjustment since it was not capable of such adjustment, but was guilty of contributory negligence; that, having regard to s. 1, sub-s. 1, of the Act of 1945, the workman's claim was not defeated by his contributory negligence;

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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and that the fault must accordingly be apportioned between him and the employers, the fair proportion being 50 per cent. against each.

Per Tucker L.J. Different considerations might arise in a case where there was no breach of statutory duty on the part of the employers, the workman having himself failed to adjust properly a properly constructed guard and there being adequate supervision in the factory. Assuming, without deciding, that any question of contribution by the employers could arise under the Act of 1945 in such a case, the blame might be apportionable as to 90 per cent. on the workman.

Smith v. Baveystock & Co., Ltd. [1945] 1 All E. R. 531 distinguished.

APPEAL from Hilbery J.

The plaintiff, Sidney William Cakebread, an employee of the defendants, Hopping Brothers (Whetstone), Ltd., was engaged in operating a circular saw in their factory. The saw was provided with a guard which, however, did not comply with reg. 10 (c) of the Woodworking Regulations, 1922, in that, owing to faulty construction, it did not, when lowered to its fullest possible extent, "extend from the top of the riving knife to a "point as low as practicable at the cutting edge of the saw."

The workman admitted in evidence that he did not like working with a guard brought down low, and he, in fact, kept it some $3\frac{1}{2}$ inches above the wood at which he was working on the machine, notwithstanding that the employers' foreman had protested at his doing so and had agreed to a compromise position for the guard. While he was at work with the guard in that position, his hand was thrown against the saw and seriously injured. He sued the employers for damages for breach of duty under the Factories Act, 1937, and the Woodworking Machinery Regulations, 1922. Hilbery J., found that the accident was due solely to the plaintiff's negligence, and dismissed the action. The workman appealed.

Edgedale for the workman. The trial judge accepted the submissions (1.) that, as this circular saw did not comply with the regulations of 1922, the duty to adjust it, under reg. 21, could not be delegated and therefore that the workman was under no duty under the regulations to adjust it; (2.) that the workman was guilty of negligence in not adjusting it; and (3.) that that negligence was the cause of the accident. On the first point the judge was right, the primary duty to adjust the guard being on the employers under reg. 21, and reg. 23 only imposing a duty on the workman not to interfere with the

employers' adjustment : *Murray v. Schwachman, Ld.* (1) ; *Lay v. D. & L. Studios* (2). Admittedly the duty under reg. 21 can be delegated : *Smith v. Baveystock & Co., Ld.* (3), but a condition precedent to delegation is that it is at least possible for the workman to carry out the delegated duty and that the employers have not (as here, with the improperly constructed guard) done anything to prevent the workman's carrying out the delegated duty : *Vyner v. Waldenberg Bros.* (4) ; *Murray v. Schwachman, Ld.* (1). The employers' guard here could not be adjusted as low as practicable as required by reg. 10 (c) ; therefore the delegated duty could not be carried out, and so there could be no delegation.

As for the second point, it is submitted that the judge was wrong in finding the workman guilty of negligence, for there can be no negligence without a duty, and the workman's duty was a statutory one under reg. 23, being merely to maintain the proper adjustment made by the employers. Therefore the workman was under no duty himself to adjust the guard. Alternatively, as for the third point, the judge was wrong in holding the workman's negligence to be the sole cause of the accident. If the employers had carried out their duty to adjust under reg. 21, there would have been no accident. Therefore any negligence on the part of the workman was only contributory, and, as such, under the Law Reform (Contributory Negligence) Act, 1945, merely affects the amount of damages. As to the degree of fault, the employers, by their foreman, acquiesced in the guard's not being kept as low down as it would go. They are therefore at least as much in fault as the workman.

Leon (Beney K.C. with him) for the employers. The evidence was that the accident had nothing to do with the employers' breach of statutory duty in failing to provide the right guard. The only breach of duty by the employers which might be said to have had anything to do with the accident was the permission given to the workman by the foreman to keep the guard in an intermediate position. As to that, (1.) the workman, as the author of his own wrong, cannot complain. He was a highly skilled man, and it was only his persuasion of the foreman that brought about the compromise. He deliberately committed a criminal offence and persuaded his employers, through their foreman, to do so with him. (2.) If he can be heard to complain

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(1) [1938] 1 K. B. 130.

(3) [1945] 1 All E. R. 531.

(2) [1944] 1 All E. R. 322.

(4) [1946] K. B. 50.

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on this score, he has not proved that the compromise arrived at between himself and the foreman was the cause of the accident. It is true that, if an accident occurs and there has been a particular breach of statutory duty at the time which might have caused it, the onus is on the employers to show that it did not cause it. Here, however, the particular breach of statutory duty was in having the guard $3\frac{1}{2}$ inches above the wood. The employers had forbidden this, and, although they would be liable in a police court, the workman who, contrary to express orders, had done a dangerous thing, cannot be heard to complain of that breach. If the guard had, at the time of the accident, been at the compromise position, undoubtedly the onus would have been upon the employers. If, however, the onus is, in fact, on the workman, he has failed to show that the accident would have happened if the guard had been in the compromise position. As a matter of fact, that is unlikely.

Finally, if both parties are to blame, by far the greater blame is on the workman who caused the accident by over-persuading the foreman in spite of his own great experience.

Edgedale replied.

LORD OAKSEY L.J. By reg. 21 of the Woodworking Machinery Regulations, 1922 : "The guards and other appliances required "by these regulations shall be maintained in an efficient state "and shall be constantly kept in position while the machinery is "in motion, except when, owing to the nature of the work being "done, the use of the guards or appliances is rendered im- "practicable. The guards shall be so adjusted as to enable the "work to be carried on without unnecessary risk." The work- man's first contention is that that regulation imposes on the employer an absolute duty in addition to that imposed by reg. 10 (c), to keep the guard, which must extend as prescribed by reg. 10 (c), so adjusted that the work can be carried on without unnecessary risk. The workman contends that if a guard is of improper construction it is impossible for the employer to fulfil his obligation in relation to it under reg. 21. By reg. 23, in Part II., which is headed "Duties of persons "employed," "Every person employed on a *woodworking* "machine shall (i.) use and maintain in proper "adjustment the guards provided in accordance with "these regulations . . . except when, owing to the "nature of the work being done, the use of the guards or "appliances is rendered impracticable." The workman con-

tends that that obligation was never binding on him because no guard was provided in accordance with these regulations. It is clear on the facts that the duty to adjust this particular guard had been entrusted to the workman. He was a man of experience, and it is obvious, as has been pointed out in this court, that in woodworking it is almost essential that the workman working a machine should adjust it himself.

The workman contends that within the meaning of these regulations no duty was imposed on him by them to make the adjustment, and that the duty which rested on the employers could not be fulfilled because the guard was an improper one. The workman also argues that, apart altogether from the regulations, there being this breach of statutory duty on the part of the employers, he is freed altogether from any duty at common law to take the care which an ordinary and reasonable man would take of himself, and that, therefore, however negligent he may be, he would not have been disentitled before the Act of 1945 from bringing an action; and he goes so far as to say that since the Act of 1945 his negligence would not have any effect.

Other facts in the case are, in my opinion, of crucial importance. Apart from the employers' breach of statutory duty in not supplying a proper guard, there was evidence which clearly establishes that they had not carried out their duties of adjustment and of supervision under reg. 21. The foreman appears on several occasions to have seen that the workman was working with this guard $3\frac{1}{2}$ inches up; and, instead of telling him that that was a breach of his duty and that he would not be allowed to work at the machine if he continued to keep the guard in that position, he entered into what he described as a compromise with the workman. [His Lordship referred to the foreman's evidence that he had seen the workman making a dangerous movement with his hand, had told him, when he objected to working with the guard lowered, that that was his (the workman's) responsibility as he (the foreman) could not force him to lower it, and that they had agreed on "a happy medium," and continued:] In my opinion, that evidence establishes a clear breach of duty on the part of the employers. They contended, first, that if this particular guard had been adjusted as low as it would go there would have been no accident. There was evidence to that effect and that was the view which the judge took. Counsel for the employers argued that that showed that the workman was alone to blame. He

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further argued that in any event the workman cannot take advantage of his own wrong, and he cited a number of cases in support of that proposition, among which were *Gordon v. Metropolitan Police Chief Commissioner* (1), and *Holman v. Johnson* (2). He also referred to *Vincent v. Southern Ry. Co.* (3). In the next place he relied upon the maxim *ex turpi causa non oritur actio*, and argued that it was clear on the facts that the workman had aided and abetted the employers, in their breach of statutory duty under reg. 21, by his failure to adjust under reg. 23, and that, therefore, the Factories Act being in the nature of a criminal statute, aiding and abetting in the commission of a crime constituted a state of affairs out of which no action could arise. Referring to the foreman's evidence, counsel argued that the workman had not discharged the onus of proving that the cause of the accident was the employers' failure to perform their statutory duty, and that there was no evidence to show that if the foreman's advice or orders had been followed the accident would have happened. Lastly, he submitted that, in any event, applying the rule introduced by the statute of 1945, the damages ought to be apportioned as to 99 per cent. to the fault of the workman and as to only 1 per cent. to that of the employers.

The Law Reform (Contributory Negligence) Act, 1945, lays down this new rule in these words, by s. 1, sub-s. 1: "Where
" any person suffers damage as the result partly of his own fault
" and partly of the fault of any other person or persons, a claim
" in respect of that damage shall not be defeated by reason of
" the fault of the person suffering the damage, but the damages
" recoverable in respect thereof shall be reduced to such extent
" as the court thinks just and equitable having regard to the
" claimant's share in the responsibility for the damage." The principal difficulty in this case seems to be that, while the employers' fault in not supplying a proper guard has been found by the judge in accordance with the evidence to have had nothing to do with the accident, there is the other allegation of breach of duty against the employers in that they did not adjust the guard. The evidence, apart from that of the foreman, shows that they entrusted the adjustment of the guard to the workman himself. It seems to me a question of doubt, which it is not necessary to decide here, whether, if those were the actual facts in the case, the workman would be entitled to

(1) [1910] 2 K. B. 1080.

(3) [1927] A. C. 430.

(2) (1775) 1 Cowp. 341, 343.

succeed at all : whether he would be entitled, having undertaken the duty of adjusting the guard himself, and having not done so but simply gone on working knowingly with it improperly adjusted, then to set up their breach of statutory duty against the employers when he himself was responsible for their duty not having been carried out. It is not necessary on the facts of this particular case to decide that point for the evidence of the foreman clearly establishes that he, as well as the workman, was negligent, in the performance of the statutory duty of adjusting the guard. It is clear, in my opinion, on the foreman's evidence, that he knew all the time that the guard was not being adjusted as well as it could be adjusted and that he left it to the workman to bring it down as low as the workman thought right. The foreman knew that the workman's view was that it was very difficult to work with the guard lowered nearly as far as it could be lowered, and he did not even specify any particular point to which the guard must be lowered, although he knew that the workman was keeping the guard up some $3\frac{1}{2}$ inches. That was a continuing breach of the statutory duty imposed by reg. 21 on the employers or somebody other than the workman, namely, the foreman. That seems to me clearly to be a breach of duty which the workman can set up against the employers. Seeing that it is impossible to prove exactly how an accident like this with a circular saw happens, it would not be right to rely upon the suggestion that there is no affirmative evidence sufficient to discharge the onus of proving that the foreman's negligence substantially contributed to the accident. Therefore, I think that the new Act comes into operation here. The workman was guilty of fault within the meaning of that Act, not necessarily a fault under reg. 23, but fault in failing to observe the ordinary care which an ordinary prudent person would have taken for his own safety ; for he knew all the circumstances and dangers, was a highly skilled man, knew exactly what he was doing, had had two accidents before with woodworking machinery, and, with his eyes open, took the risk. That was clearly negligence on his part. There is nothing in the Factories Act or the Woodworking Machinery Regulations which, in my view, exempts him from responsibility for a lack of due care on his own part. Therefore, I think that these damages of 600*l.* ought to be apportioned between the employers and the workman in equal proportions, and that the appeal should be allowed.

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TUCKER L.J. This accident happened on July 5, 1945. If it had happened three weeks earlier I should have certainly agreed in the result with the judgment of Hilbery J., for, at that time, contributory negligence on the part of a plaintiff or negligence on his part causing the accident would have put him out of court. The accident, however, in fact happened three weeks after the Act of 1945 had come into force. Therefore, it now becomes necessary to consider the effect of that Act on these claims under the Woodworking Machinery Regulations, which were difficult enough in all conscience before.

I propose first to state my conclusions, then to see whether they are inconsistent with any authority binding on this court. The guard on this machine was at all times in breach of reg. 21 of the Woodworking Machinery Regulations, 1922. It is conceded that it was not possible to adjust it so as to enable the work to be carried on without unnecessary risk. It has been held by this court, as a general working rule at any rate, that in normal circumstances anything over one-eighth of an inch would be a non-compliance with this regulation. Therefore, whenever this machine was being used by the workman or by anybody else the employers were continuously and at all times in breach of their duty to maintain the machine in proper adjustment. The workman, working on a machine with a guard which could not be brought down to within one-eighth of an inch, was injured when it was 3 to 3½ inches up. The duty of the employers was at all times to maintain it at not more than an eighth of an inch from the wood. It seems to me impossible, in those circumstances, to say that the breach by the employers of their statutory duty was not a cause contributory to the accident which resulted, and I so find. That, of course, leaves entirely for further consideration whether or not the workman himself was guilty of any breach of statutory duty or of negligence.

I do not think that reg. 23 is relevant here, because it lays down that every person employed on a woodworking machine shall use and maintain in proper adjustment the guards provided in accordance with the regulations, whereas, when a woodworking machine has not been provided with a guard in accordance with the regulations, the workman operating it cannot use and maintain the guard in proper adjustment. That still leaves open the question whether or not the plaintiff workman is absolved from the common-law duty of using ordinary, reasonable care for his own safety.

I think, therefore, that the employers were in breach of their statutory duty and that that breach contributed to the accident which resulted. Furthermore, I agree with my Lord that in any event the employers were negligent and in breach of their duty to provide adequate supervision over the work carried on in the factory, in that their foreman knew that the workman was working this machine with the guard several inches off the wood. He acquiesced in the continued user in breach of the regulations of that machine with the guard at a dangerous distance from the wood, although he mildly protested and demurred. That failure to provide adequate supervision was a contributory cause of the accident.

The next question is whether, in the circumstances, since the Act of 1945, the workman is precluded altogether from recovering. As I have already said, if this accident had happened before the Act came into force, I think that he would have failed, because he was clearly guilty of contributory negligence although not of a breach of reg. 23. He was an experienced man who knew the regulations. Although there had not been a delegation to him under reg. 23 as the properly appointed person to work this machine, he owed a duty at common law to take reasonable care. To hold otherwise would be to produce very remarkable results and would be contrary to these words of Lord Ellenborough in *Butterfield v. Forrester* (1) : "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." I can see no reason why those observations should not apply to cases under the Factories Act.

In support of that view, I observe that this question has in recent years been more than once before the House of Lords, who have decided that contributory negligence is open to the employers by way of defence in cases of this kind. In *Lewis v. Denye* (2) Lord Simon, referring to the regulations of 1922, said: "I am not satisfied that a breach of Regulations for

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(1) (1809) 11 East. 60, 61.

(2) [1940] A. C. 921, 929.

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" Dangerous Trades imposing duties on the workman in all cases automatically furnishes a defence to the employer whom he sues for damages for breach of statutory duties imposed on the employer. The workman's breach may, however, be such as to provide evidence of his negligence. And here, apart altogether from reg. 23, negligence of the appellant which caused the accident was in my opinion made out." I think that that applies here. I would emphasize that this is not a case where the only breach on the part of the employers is a breach committed by the workman himself. A proper machine may be provided, as in *Smith v. Baveystock & Co., Ltd.* (1) and originally adjusted properly, and there may be delegation under reg. 23 to a properly instructed and skilful man, who fails to adjust the properly constructed machine. Different considerations may arise in such a case, where the sole statutory breach is due to the act of the workman himself. Here, in my view, apart altogether from the act of the workman, there was a continuous breach on the part of the employers by reason of the fact that they supplied a machine which could not be properly adjusted and which was therefore at all times out of adjustment and in breach of reg. 21.

I must next consider whether the decision at which I have arrived is contrary to those cited in argument. In *Smith v. Baveystock & Co., Ltd.* (1), a case under these same regulations, as the headnote states: "The appellant, an experienced circular saw operator, was employed by the respondent company to operate a circular saw in its factory. The guard of the saw complied with the Woodworking Machinery Regulations, 1922, and it was part of the appellant's duties to adjust the guard to his requirements. At the material time the appellant was cutting planks which varied in thickness and he had so adjusted the guard as to allow the thickest part of the plank free passage. Whilst sawing the wood the appellant's finger passed under the guard and was injured on the saw. The appellant brought an action against the respondent company alleging breach of the Woodworking Machinery Regulations, 1922, reg. 21 and/or breach of common-law duty." Goddard L.J. in his judgment, after explaining that the employers could only carry out their obligations under the regulations by delegating their duties to somebody, said (2): "The plaintiff adjusted the guard at what he considered was a suitable height to enable him to cut

(1) [1945] 1 All E. R. 531.

(2) Ibid. 534.

“ through this plank which was of varying or irregular thick-
 “ ness without stopping the machine. For myself I should
 “ have thought, provided, of course, that he had not left a
 “ wholly unnecessary gap, that he would put an adjustment
 “ on the guard which, in the circumstances, was practicable.
 “ But in any case it seems to me that the delegated duty had
 “ been put on him to adjust this guard and if he did not adjust
 “ the guard in such a way as was safe, it seems to be pretty
 “ clear—and that was the foundation of the decision in *Vincent*
 “ v. *Southern Ry. Co.* (1)—that he cannot complain of it.
 “ He cannot take advantage of his own wrong and say to his
 “ employer ‘ Although you left me to adjust it and I did not
 “ ‘ adjust it, therefore I am going to claim damages against
 “ ‘ you.’ For myself I should say that there was no negligence
 “ in anybody in this case nor any breach of statutory duty.
 “ The employer had provided a perfectly proper machine and a
 “ perfectly proper guard. He had delegated the duty of
 “ seeing that the guard was properly adjusted to a perfectly
 “ competent person. He used the guard because the use of the
 “ guard was practicable and he adjusted it to such an extent
 “ that he considered it practicable for the work which he had
 “ to do. It does seem to me that if you are cutting one of these
 “ boards, which was to some extent of irregular thickness, that
 “ the guard was not unduly high. It was adjusted as far as
 “ practicable for the thickest part of the wood to pass through.
 “ Under those circumstances it seems to me there is no breach
 “ of statutory duty on the part of the employer. If it could be
 “ said there was, then the plaintiff, who was the person who had
 “ the duty of adjusting this guard, cannot be heard to say that
 “ he was not negligent or in breach of his statutory duty in
 “ doing what he did. I think, therefore, on the whole that this
 “ judgment was perfectly right and the appeal fails and must
 “ be dismissed.” I would emphasize, first, that Goddard L.J.
 was there finding that there had been no breach of statutory
 duty by anybody, which at once differentiates that case from
 this; and, secondly, that when he says that in any event if
 the workman “ did not adjust the guard in such a way as was
 “ safe, it seems to be pretty clear that he cannot complain
 “ of it,” and refers to *Vincent v. Southern Ry. Co.* (1), he had
 not before him, of course, the question whether or not under the
 Act of 1945 there might have been such negligence or breach of
 statutory duty as would necessitate an apportionment.

(1) [1927] A. C. 430.

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du Parc L.J. in his judgment shows that that is the position. He said (1): "I think they [the employers] are entitled to say: 'The fault is really yours and not ours. We were quite entitled to rely on you. True, if somebody else had been injured by any failure on your part to fulfil your obligation we should have had to pay the penalty, we should have been responsible to him. We cannot rid ourselves of our obligation. But it is quite absurd to think that if you who are really the person to blame because you were reasonably and properly entrusted by us with this duty, failed to carry it out, therefore, we have got to pay damages to you'."

That, again, leaves entirely at issue what the position would have been under the Act of 1945 in *Vincent v. Southern Ry. Co.* (2) where the House of Lords held that there was an absolute duty on the railway company to provide a look-out man and to see that he was instructed to act. Rule 9 of The Prevention of Accidents Rules, 1902, provided: "... railway companies shall . . . in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working." The House held that that was an absolute obligation on the part of the company, and that they did not fulfil it merely by making the necessary regulations. In holding that on those facts the widow of the injured man, whose duty it was to provide one of his gang to act as a look-out, could not succeed, language was used which has been relied on in this case for the proposition that in such circumstances the workman would not be able to recover even after the passing of the Act of 1945. Lord Cave, in delivering the leading opinion in that case, with which Lord Atkinson and Lord Shaw agreed, said (3): "The duty of a company in any case of danger is an absolute duty to provide a look-out man and to see that he is instructed to act; and if in any case it were proved that the foreman to whom, under the company's regulations, this duty was entrusted had failed in his duty and had not appointed a look-out man, the company might well be held liable for injury happening to any member of the gang other than the foreman himself. This does not mean that, in my opinion, the company in charging the foreman or ganger with the duty of deciding

(1) [1945] 1 All E. R. 535.

(3) Ibid. 437.

(2) [1907] A. C. 430.

"whether danger exists and of appointing a member of his gang to act as a look-out is taking an unreasonable course. Being a corporation, they must necessarily entrust that duty to some agent, and I see no sufficient reason why the foreman or ganger (who will be on the spot) should not be selected for that duty; but nevertheless if he should fail in that duty, the company may be liable for the consequences of the default to any person not concerned in it." That passage is relied on by Mr. Leon for the employers. Lord Sumner, who did not altogether concur in the views of the other Law Lords, after saying that he agreed with the Court of Appeal that the plaintiff was in a dilemma, continued (1): "If Vincent failed to post a look-out or, being the look-out himself, failed to be duly vigilant, he contributed to his own death." In that case, of course, the House of Lords had not before it, any more than had Goddard L.J. in *Smith v. Baveystock & Co., Ltd.* (2), the question what the position would have been under this new Act of 1945, and I do not read the observations of any of their Lordships as compelling me to hold that the workman here is entirely out of court by reason of his negligence. I think that he was negligent and that his negligence contributed to the accident, as did the breach of statutory duty and common-law negligence of the employers. I therefore think that this is a case under the new Act for apportioning the damages. I agree with the figure proposed by my Lord. I think that the damages should be equally apportioned in this particular case on the ground of the interview between the workman and the foreman. I can quite conceive that, in a case of the type of *Smith v. Baveystock & Co., Ltd.* (2), where nothing of that kind occurs, a competent skilled man is left in charge of a properly constructed machine, there is proper delegation to him under reg. 21 and proper supervision in the factory—if in those circumstances the workman is injured, and assuming, without deciding, that the question of contribution would arise in such a case, I can quite conceive, and I say no more, that a court might take the view that in those circumstances something like 90 per cent. of the blame might possibly fall on the plaintiff workman. I think that this case is on its facts to be distinguished altogether from a case of that kind. I agree that the appeal should be allowed.

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COHEN L.J. The case has been so fully discussed by my
(1) [1927] A. C. 441. (2) [1945] 1 All E. R. 531.

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brethren that I can quite shortly state my reasons for agreeing that this appeal should be allowed. It seems to me plain and beyond dispute that the employers had committed a breach of the statutory duty imposed on them by reg. 21 of the Wood-working Machinery Regulations, 1922. It is also clear that this breach continued up to the time of the accident, and, in my view, if the duty had been fulfilled, the accident could not have happened. In those circumstances, it seems to me that the proposition thus stated by Scott L.J. in giving the decision of this court in *Vyner v. Waldenberg Brothers, Ltd.* (1) is relevant here: "If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause."

How do the employers here seek to discharge that onus? Mr. Leon on their behalf, relied, first on the maxim *ex turpi causa non oritur actio*. It is not necessary for the workman here to aver, or indeed, to prove, any of the facts which are alleged to form the *turpis causa*, but it did transpire in the course of his evidence that he was responsible for the position in which the guard was found. Counsel therefore contended that he was aiding and abetting the employers in the neglect of their duty under reg. 21, and that accordingly the following words of Lord Mansfield in *Holman v. Johnson* (2) were applicable: "If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted." I feel some doubt whether this workman could be said to be aiding and abetting the employers' breach of duty; but, even assuming in favour of the employers that they established the requisite facts, I still think that this argument is ill founded. The maxim *ex turpi causa* is based on public policy, and it seems to me plain on the facts of this case that public policy, far from requiring that this action shall be dismissed, requires that it shall be entertained and decided on its merits. The policy of the Factories Act makes it plain that such a defence as that put forward here would be inconsistent with the intention of Parliament.

Alternatively, counsel argues that the workman was the sole cause of the accident, and he relies on the cases which have been discussed by my brother Tucker, *Smith v. Baveystock*

(1) [1946] K. B. 50, 55.

(2) 1 Cowp. 341, 343.

& Co., *Ld.* (1) and *Vincent v. Southern Ry. Co.* (2). *Smith v. Baveystock & Co., Ld.* (1) is distinguishable, as my brother has pointed out, because there was there no breach of statutory duty. That seems to me a most material distinction because, as I see the facts of this case, the workman is not seeking in any sense to take advantage of his own wrong. He is taking advantage of the independent continuing breach by the employers of their statutory duty under reg. 21, a breach of duty coincident with his own negligence, assuming that to be established; and the breach was continuing up to the very moment of the accident. Even if I were wrong on this point, I should still be of opinion on the evidence of the employers' foreman that it was impossible to say that the workman was solely responsible for this accident.

The last point raised for the employers related only to the question of contributory negligence. I agree so entirely with the reasons given by my brethren for holding the workman guilty of contributory negligence that I need not add anything on that point. The workman being guilty of contributory negligence, I agree with my brethren that the damages should be apportioned equally under the Act of 1945.

Appeal allowed.

Solicitors for the plaintiff workman: *Shaen, Roscoe & Co.*

Solicitors for the defendant employers: *Goldingham, Wellington & Co.*

(1) [1945] All E. R. 531.

(2) [1927] A. C. 430.

JOHN ROBERT ANDREWS *v.* ISABELLA CORDINER.

1947

Apr. 16.

Bastardy—Wife of serving soldier—Evidence of non-access of husband—Regimental service records—Evidence Act, 1938 (1 & 2 Geo. 6, c. 28), s. 1, sub-ss. 1, 2, 4 and 5.

Lord Goddard
C.J.,
Atkinson and
Oliver JJ.

In bastardy proceedings brought by the wife of a serving soldier the justices admitted as evidence of non-access by the husband regimental service records produced by a warrant officer whose duty it was to take charge of such records. On appeal by the defendant by way of case stated by the justices:—

Held, that the service records were properly admissible as evidence under the Evidence Act, 1938.

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CASE STATED by East Coquetdale (Northumberland) justices.

A complaint was preferred by the respondent, Mrs. Isabella Cordiner against the appellant, John Robert Andrews, alleging that he was the putative father of a bastard child born to her on March 10, 1946. The complaint was preferred on March 25, 1946. The complainant, being a married woman, had to establish that she was a single woman within the meaning of the Bastardy Acts, by proving that there had been no possibility of her husband's having access to her during the nine months preceding the birth of the child. The justices, not being satisfied on that point, granted an adjournment. At the adjourned hearing a warrant officer in the Records Office of the Royal Air Force at Gloucester produced the service record relating to the complainant's husband, which showed that the husband had been serving in the Middle East continuously from May 17, 1943 to November 19, 1945.

It was contended for the putative father that the record in effect constituted hearsay evidence and was not admissible, and that as the remaining evidence of non-access had not been found conclusive the complaint should be dismissed.

The justices found the complainant's case otherwise made out, and left for the opinion of the court the question whether the service record had been properly admitted by them.

John Charlesworth for the appellant Andrews.

The respondent did not appear and was not represented.

LORD GODDARD C.J. Oliver J. will deliver the judgment of the court.

OLIVER J. This is a case stated by the justices of the petty sessional division of East Coquetdale Ward, in the county of Northumberland, in which the question raised is whether, in bastardy proceedings, they were entitled to treat as admissible in evidence a certain regimental record, which purported to show that the husband of a woman who was taking bastardy proceedings against the present appellant had had no chance of access to her during the period of her gestation preceding the birth of her illegitimate child. I may mention in passing, of course, that where a married woman brings bastardy proceedings, she cannot succeed unless she proves affirmatively that there was no possibility of access during the period of gestation. The case stated that for the purpose of satisfying

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the justices of non-access, one James Scringeour was called, who deposed " that he was a Warrant Officer in the Records " Office of the Royal Air Force at Gloucester and that it was " part of his duty, as such, to take charge of the service records " of various personnel in the Royal Air Force, and that those " records showed (inter alia) the dates of departure from and " return to the United Kingdom of members of the Royal Air " Force. Witness produced the permanent record relating to " No. 534236 Corporal David Cordiner "—he is the husband in question in this case—" who, we were satisfied, was the " husband of the respondent. The record disclosed that the " said Corporal David Cordiner proceeded to the Middle East " on the 17th day of May, 1943, and served continuously over " seas until the 19th day of November, 1945, and that at no " time during that period of service was he granted leave to the " United Kingdom. Had he been granted leave witness " deposed that it would have been recorded in the record " produced. The record produced by witness was said to be " the property of the Air Ministry and a Crown privileged " document."

I have read that as showing what was the nature of the record and the source from which it was produced. The question left for our decision in the case is whether the justices were entitled to take that evidence of Scringeour into consideration in coming to their decision. The decision they came to, in fact, was that that was admissible and was sufficient evidence of non-access to enable them to act and make the bastardy order.

There is no authority directly on this matter, but the point argued, quite properly, by Mr. Charlesworth, who appeared for the appellant—the respondent is not represented—was the question whether the justices were right or wrong in saying that that evidence was admissible under the Evidence Act, 1938. I need not go into the question of the law as applicable to a criminal case ; this, of course, is not a criminal case, and the Evidence Act, 1938, applies to it.

It is conceded by Mr. Charlesworth that the document in question, the regimental record, does fall within the definition in s. 1, sub-s. 1 (i.) : " if the maker of the statement either " (a) had personal knowledge of the matters dealt with by the " statement ; or (b) where the document in question is or forms " part of a record purporting to be a continuous record, made " the statement (in so far as the matters dealt with thereby are " not within his personal knowledge) in the performance of a

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" duty to record information supplied to him by a person who
" had, or might reasonably be supposed to have, personal
" knowledge of those matters."

I can pause there to say that Mr. Charlesworth quite properly agrees that this regimental record is such a document as that. Then the sub-section proceeds: " Provided that the condition
" that the maker of the statement shall be called as a witness
" need not be satisfied if he is dead, or unfit by reason of his
" bodily or mental condition to attend as a witness, or if he is
" beyond the seas and it is not reasonably practicable to secure
" his attendance, or if all reasonable efforts to find him have
" been made without success." I have read the whole of that, but not much of it applies to this case, except that there is certainly a reasonable inference in this case that one or more of the presumably numerous makers of entries in this regimental record are abroad, or have been at material times abroad.

The section proceeds in sub-s. 2: " In any civil proceedings,
" the court may at any stage of the proceedings, if having
" regard to all the circumstances of the case it is satisfied that
" undue delay or expense would otherwise be caused, order that
" such a statement as is mentioned in sub-s. 1 of this section
" shall be admissible as evidence or may, without any such order
" having been made, admit such a statement in evidence."
That gives an exceedingly wide power, and it is on that power, certainly in part, that the justices appear to have acted. It is difficult to imagine what would be more likely to cause undue delay and expense than to require everybody who had made an entry in a regimental record of this sort to be brought from abroad or elsewhere to give evidence about it.

The sub-section mainly relied on by Mr. Charlesworth is sub-s. 4: " For the purposes of this section, a statement in a
" document shall not be deemed to have been made by a
" person unless the document or the material part thereof was
" written, made or produced by him with his own hand, or was
" signed or initialled by him or otherwise recognized by him
" in writing as one for the accuracy of which he is responsible."
Mr. Charlesworth said that there was no evidence that any of those matters existed in this case, but my Lord directed attention to the following sub-section as extricating the matter from difficulty. It reads as follows: " (5.) For the purpose of
" deciding whether or not a statement is admissible as evidence
" by virtue of the foregoing provisions"—that is, including, of course, the provisions of sub-s. 4—" the court may draw any

"reasonable inference from the form or contents of the document
 "in which the statement is contained, or from any other
 "circumstances."

How could any document have greater probability of accuracy?—and that is, after all, the reason for which it is relied on. How could any document come from a more attractive source than a regimental record of this nature? There is the nature of the document, the fact that it comes from the proper custody, and the fact that it is produced by the officer having custody of it, there being no temptation on anyone's part falsely to record entries. These are matters which raise the strongest probability that the entries are true.

In these circumstances, the court thinks that the justices acted very properly in this matter, and the appeal is dismissed.

Appeal dismissed.

Solicitors for the appellant: *Hyde, Mahon & Pascall, for Frank J. Lambert & Co., Gateshead.*

A. W. G.

EDWARDS v. JONES.

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Apr. 24.

Justices—Summary jurisdiction—Information charging two offences—Procedure—Duty to have information amended—Charges of dangerous driving and driving without due care and attention—Summary Jurisdiction Act, 1848 (11 & 12 Vict., c. 43), ss. 1, 10—Road Traffic Act, 1934 (24 & 25 Geo. 5, c. 50), s. 35.

Lord Goddard
 C.J.,
 Atkinson and
 Oliver JJ.

The provision in s. 1 of the Summary Jurisdiction Act, 1848, that no objection is to be taken or allowed to any information for any alleged defect therein in substance or in form does not mean that justices can proceed to hear an information which charges two offences contrary to s. 10 of that Act.

In such a case the justices should have the information amended by requesting the prosecutor to elect on which charge he will proceed and then striking out the other charge. If the prosecutor declines to elect, the information is bad and should be dismissed.

Johnson v. Needham [1909] 1 K. B. 626, considered.

Rodgers v. Richards [1892] 1 Q. B. 555, not followed.

CASE STATED by justices.

At a court of summary jurisdiction sitting at Llandudno an information was preferred by the respondent against the

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appellant under the Road Traffic Act, 1930, charging him with having on August 11, 1946, unlawfully driven a motor car in a manner dangerous to the public having regard to all the circumstances of the case, contrary to s. 11 of that Act, and with having on the same date and at the same place unlawfully driven a motor car without due care and attention contrary to s. 12, sub-s. 1, of the same Act.

On the hearing of the information the appellant pleaded not guilty and it was submitted on his behalf that the information was bad as being for two offences contrary to s. 10 of the Summary Jurisdiction Act, 1848, and that the respondent should elect on which charge he would proceed. On the part of the respondent it was stated that he was not seeking a conviction on both charges, but on one or the other only, and that it was not for the respondent to elect but for the justices to decide, after hearing the evidence, which offence had been committed.

The justices held that the contention of the respondent was correct, but they invited the appellant's solicitor, if he so wished, to apply for an adjournment and stated that they were prepared to grant such an adjournment in which event the respondent could amend his information. That offer was declined on behalf of the appellant. The justices thereupon heard the evidence and it was proved or admitted that on the date named the appellant did drive a motor car without due care and attention, but not in a manner which was dangerous to the public having regard to all the circumstances of the case. They therefore held that the appellant was not guilty of unlawfully driving a motor car in a manner which was dangerous to the public, but guilty of unlawfully driving without due care and attention. They imposed a fine of 10*l.* and ordered the appellant to pay 9*l.* 6*s.* 2*d.* for costs and his driving licence to be endorsed.

At the request of the appellant the justices stated this special case for the opinion of the High Court.

Emlyn-Jones and *Coplestone-Boughey* for the appellant. The information was bad because it was contrary to s. 10 of the Summary Jurisdiction Act, 1848. Even if it was not altogether bad the manner in which the proceedings were conducted by the justices rendered them improper. In *Johnson v. Needham* (1), where it was held that the justices could not decline to proceed merely on the ground that the summons was irregular in form,

(1) [1909] 1 K. B. 626.

the principle was recognized that no conviction could take place on a summons or information which charged more than one offence. The defendant is entitled to know what is charged against him.

Arthian Davies for the respondent. The appellant, in order to succeed, must prove not that the information is bad, but that the conviction is bad. Section 1 of the Summary Jurisdiction Act, 1848, says that no objection is to be taken or allowed to any information for any alleged defect in substance or in form. The justices were therefore entitled to proceed with the hearing of the case. In *Rodgers v. Richards* (1), in which the magistrate allowed an objection that the information disclosed two offences, the Divisional Court held that that was a defect in substance within the meaning of that section and remitted the case to the magistrate for hearing. Again, in *Johnson v. Needham* (2), Lord Alverstone C.J. said that the time when the prosecution could be called on to elect on which charge they would proceed did not come until after the evidence had been heard. That case, taken in conjunction with *Rodgers v. Richards* (1) shows that where two offences are included in one information, that is a defect in substance within s. 1 of the Summary Jurisdiction Act, 1848, and the justices are entitled to disallow any objection thereto and to go on with the hearing of the case.

LORD GODDARD C.J. This case raises a question with regard to what should happen where more than one offence is contained in the information which is preferred against a defendant. I desire to say at once that this is a point which in some respects may be described as technical, and it must not be thought that I am in any way reflecting on the justices in this case because they are lay justices. It is the duty of the prosecution to assist the justices and the duty of their clerk to keep them right on these matters. It appears to me that the procedure in this case was quite wrong and that the justices ought to have been advised that they could not proceed in this way.

In the Summary Jurisdiction Act, 1848, it is laid down that an information shall be for one offence only. There is also a provision in the same Act that no objection as to substance or form is to prevail, but that does not mean that the justices can, where a statute provides that an information shall be for one offence only, proceed to hear an information which charges two

(1) [1892] 1 Q. B. 555.

(2) [1909] 1 K. B. 626.

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offences at the same time. If magistrates find an information preferred which contains two offences and not one, they should take steps to see that it is amended. The way they should do it—the authorities bear this out—is by saying to the prosecutor: “On which offence do you elect to proceed?” The prosecutor can then say: “I will elect to proceed upon offence A.” Thereupon the information should be amended by striking out the second offence charged, so that the defendant is only called upon to answer to the one offence. On the other hand, if the prosecutor says: “I decline to elect,” then the information is bad. No conviction could take place upon it, because any such conviction would be bad for duplicity. Therefore magistrates in those circumstances should say: “If you will not elect we dismiss the information because it is bad.”

I think that is really all this court decided in *Johnson v. Needham* (1). The judgment in that case, which was delivered by Lord Alverstone C.J., must not be considered to be an authority for saying that magistrates can proceed upon a bad information and hear two or three offences at the same time and then elect to convict upon one. That is certainly not what that case means. The information there charged three offences: the magistrates called upon the prosecutor to elect which offence he would proceed upon, and the prosecutor declined to elect. Thereupon the magistrates dismissed the summons and this court held that the magistrates were right in so doing. If that case is properly understood, I think it shows that the procedure which I have stated is correct and has been so recognized by this court. There is no ground for saying that if an information discloses two offences the magistrates can hear the two offences together and then say: “We will convict on one.” That would be giving the go-by to the provisions of s. 10 of the Act, which makes it clear that in a magistrates’ court a defendant can only be called upon to answer one charge at a time. If there are two informations or summonses against a defendant, in which the facts are very much the same, of course it is quite open to the defendant to say that he will agree to their being heard at once. That is constantly done and there is no reason why it should not be done. In this case the defendant did not agree to anything of the sort. He took the objection that the information was bad, and so it was. No agreement by the defendant would put that right. But the information could have been amended by striking out one of the

(1) [1909] 1 K. B. 626.

charges. A charge could then have been preferred under the other section and the defendant could have said: "I want one heard first and see what happens to that, and then I will consider what I will do with regard to the second charge."

It should also be remembered in regard to the offence of dangerous driving that a special provision has been made as to that in the Road Traffic Act, 1934, s. 35. It might have been a useful amendment of the law if the Act of 1934 had provided that where a person was charged with the offence of dangerous driving it should be open to the justices to convict him on that information of the offence of driving without due care and attention: just as by virtue of another section in that Act, if a person is charged on indictment for manslaughter through dangerous driving of a car, he may be convicted, not of manslaughter, but of the lesser offence of dangerous driving. It is the same position as in the case of a charge of attempted murder where a jury can find a man guilty of wounding with intent to commit grievous bodily harm, and not guilty of attempted murder, without any separate count in the indictment, or as in the case of an indictment of wounding with intent to commit grievous bodily harm when the accused can be convicted of unlawful wounding. It might have been well if Parliament had provided that on a charge of dangerous driving the magistrates might find a man guilty of driving without due care and attention, but they have not done so. Section 35 of the Act of 1934 says: "Where a person is charged . . . with an offence under "s. 11"—that is to say, where he is charged with reckless or dangerous driving—"and the court is of the opinion that the "offence is not proved"—that is to say they have come to the conclusion on hearing the evidence that the offence was not proved—"then, at any time during the hearing or immediately "thereafter, the court may, without prejudice to any other "powers possessed by the court, direct or allow a charge for an "offence under s. 12 of the principal Act (which relates to careless driving) to be preferred forthwith against the defendant "and may thereupon proceed with that charge, so however "that he or his solicitor or counsel shall be informed of the "new charge and be given an opportunity, whether by way of "cross-examining any witness whose evidence has already "been given against the defendant or otherwise, of answering "the new charge, and the court shall, if it considers that the "defendant is prejudiced in his defence by reason of the new "charge being so preferred, adjourn the hearing." Observe

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the careful provision which is made in that section to prevent the two charges being heard together. The magistrates must first come to a conclusion that the dangerous driving charge is not made out, and then a separate charge may be preferred of driving without due care and attention. That emphasizes the point which I have been making that the defendant is never to be called upon to answer two charges at the same time unless there are two separate informations and he consents to their being heard together.

In *Rodgers v. Richards* (1) the charge was for unlawfully using a place for the purpose of fighting two dogs and encouraging and assisting at the fighting of such dogs. Again, two offences were included in the information. It is to be observed that there the magistrate held that the objection taken that the information disclosed two offences was good, but he refused to amend the information and summons for reasons which I need not go into, and the prosecutor took a case to this court. I should have no hesitation, if necessary, in differing from the decision in that case, not because we are sitting now as a court of three, and that was a court of two, but because the case was not argued for the defendants, who did not appear. When a case has been argued only on one side, it has not the authority that a case has which has been argued on both sides. I certainly find the judgment of Hawkins J. somewhat difficult to follow. He says (2): "By s. 1 no objection is to be allowed to any information for any defect in substance or in form, or for any variance between it and the evidence adduced. Now, was the irregularity in this information a defect in substance or in form? In my opinion it was a defect in substance because the charging of two offences in one information is forbidden by statute. No objection, therefore, to the information ought to have been allowed on such a ground." If he means it was not open to the defendant to object, with all respect to that learned judge, I entirely differ. The objection was one which ought to have been taken, because the information was not in accordance with s. 10 of the statute. It may be that it was not to be allowed in the sense of being there and then dismissed; but that is another matter. Then he goes on to say: "In the case of a variance between the charge and the evidence adduced, the justices are empowered to adjourn the case, but this is only in the case of variance. Where the objection is for a defect in

(1) [1892] 1 Q. B. 555.

(2) Ibid. 556.

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“ substance or in form, there is no such power. It seems only
 “ good sense to say that if the information charges two offences,
 “ the defendant must be prepared to meet both ”—with that
 statement of the law, again, I say with all respect,
 I emphatically differ—“ He may rightfully object to being sued
 “ on more than one charge, and it would be competent to the
 “ justices to say whether the information in fact disclosed
 “ more than one offence.” There I quite agree. He might
 rightfully object to being tried on more than one charge, and it
 is competent to the justices to say whether the information
 disclosed more than one offence. Then the learned judge goes
 on: “ In the present case it is admitted that two offences
 “ were charged. That is, as I have said, a defect in substance,
 “ in respect of which no objection should have been allowed,
 “ and the case must therefore be remitted to the magistrate ”:
 although he had said before that he might rightfully object to
 being proceeded against on more than one charge. I think the
 judgment of Wills J. is much more easily understood. That
 learned judge said (1): “ The justices, no doubt, if two offences
 “ are charged in one information, may decline to allow the
 “ prosecutor to proceed on both ; but it is impossible to say
 “ that because one such charge is discarded, the other cannot
 “ be proceeded with.” I think in saying “ may decline to
 “ allow the prosecutor to proceed on both ” the learned judge
 meant to say “ must decline to allow the prosecutor to proceed
 “ on both, and then if one charge is discarded the other can be
 “ proceeded with.” Of course it can. But throughout this
 case there was no amendment of the information or discarding
 of the one charge. Therefore, it seems to me that the procedure
 and the formalities prescribed by the Summary Jurisdiction
 Act, 1848, have not been fulfilled and the defendant has been
 called upon to answer two charges at the same time, which
 is exactly what the provisions of the Act are designed to
 prevent.

Another reason which seems to me to be a compelling reason
 in this case is that if the conviction had to be drawn up for the
 purposes of an appeal, the conviction must follow the infor-
 mation. It is elementary law that a conviction always follows
 the information. If the conviction showed two findings,
 one of not guilty on one charge and guilty on another, there
 you would have a conviction which at once would show,
 there was duplicity in the information, and which, in my

(1) [1892] 1 Q. B. 557.

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opinion, would be bad. If, on the other hand, the conviction was drawn up with one charge only, it would mean that it was not following the information, so that again it would be bad. I do not think, therefore, it would have been possible in this case to have properly drawn up a conviction which could have stood.

For these reasons, I think that the special case must be answered in favour of the appellant and the appeal must be allowed and the conviction quashed.

ATKINSON J. I agree and I only want to add one word with reference to *Rodgers v. Richards* (1). It is interesting to see that the argument for the prosecutor puts my Lord's judgment in a nutshell. It was this: "Admitting that the information disclosed two offences, the magistrate ought not to have dismissed the summons. He ought to have amended the information and summons by calling on the prosecutor to elect on which charge he would proceed." I think from that that in reading what Wills J. said, one must substitute the word "must" for "may": "The justices, no doubt, if two offences are charged in one information, must decline to allow the prosecutor to proceed on both"—that had been conceded by the prosecutor—"but it is impossible to say that because one such charge is discarded the other cannot be proceeded with."

OLIVER J. I agree. By s. 10 of the Summary Jurisdiction Act, 1848, it is laid down in terms that every such information shall be for one offence only, and not for two or more offences. In this case the information quite openly and deliberately charged two offences. If we were to uphold this conviction there is no reason that I can see why an information should not contain fifty or any other number of different offences. To my mind it is fundamental in summary jurisdiction procedure that an information should contain only one offence. Our attention has been drawn to the provisions of s. 1 of the Act, which say that no objection is to be taken or allowed with regard to substance or form. All I take that to mean is that no information is to be summarily dismissed because it is defective in form or in substance, but it must be put in order. It must be put in a condition in which it is not in complete violation of s. 10 before it is heard. On that I agree with every word which has fallen from my Lord.

(1) [1892] 1 Q. B. 555.

I also further agree with him that the effect of what was done in this case is to produce this position. There is an information charging two different offences. One of them has been found proved, the other has been found disproved. If a conviction is to be drawn up, how is it to be done? The information has to be dealt with as a whole. It has either to be found proved and so a conviction recorded, or it is to be found disproved and a dismissal recorded. To split it into halves and say that one bit is proved and another bit is disproved involves, to my mind, an operation as impossible as a few years ago splitting the atom was thought to be. It seems to me it cannot be done. There is no adjudication at all upon a part of the information as it was drawn.

I agree also with what my Lord and my brother have said about *Rodgers v. Richards* (1). I find myself quite unable to follow the reasoning of Hawkins J. More particularly I select the sentence: "It seems only good sense to say that if the information charges two offences, the defendant must be prepared to meet both." It would seem to be equally good sense to say if you charge a hundred offences the same result would follow. I cannot agree with that statement. I also agree with what has fallen from my Lord and my brother about the judgment of Wills J., which I think expresses the true view.

I further associate myself with the view expressed by my Lord that it would have been far better if the Road Traffic Act, 1934, had conferred a power on justices, on a charge of dangerous driving, to convict of a lesser offence, a power which has been conferred on the courts in a number of other cases to which allusion has been made.

Appeal allowed.

Solicitors for appellant: *Whitlock & Storr, for W. Brookes Parry, Rhyl.*

Solicitors for respondent: *Bell, Brodrick & Gray, for Henderson & Hallmark, Llandudno.*

(1) [1892] 1 Q. B. 555.

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Apr. 29.

Lord Goddard
C.J.,
Atkinson and
Oliver JJ.

STIMSON v. PITT.

Highway—Pedestrian crossing places—Intersection of two roads—Four traffic light signals installed—Transit across one road divided by refuge—One crossing or two separate crossings—Whether second crossing controlled by light signal—Duty of driver approaching crossing—Green light—Driver of motor vehicle proceeding and turning right—Pedestrian on crossing knocked down—Traffic Signs (Size, Colour and Type) Provisional Regulations (dated December 22, 1933), reg. 28—Pedestrian Crossing Places (Traffic) Regulations, 1941 (St. R. & O. 1941, No. 397), r. 4(1).

Two roads intersected and four traffic lights were installed at the intersection, two facing north and south and two facing east and west. One of the roads was very wide and was divided by a refuge. The driver of a motor vehicle approached the crossing with the traffic light showing green, he proceeded across the crossing and turned right and knocked down a pedestrian who was crossing the wide road between the studs. Proceedings were taken against the driver under reg. 4, of the Pedestrian Crossing Places (Traffic) Regulations, 1941, on the ground that the pedestrian crossing upon which the pedestrian had been knocked down was a "crossing where traffic is not being controlled " by a police constable or by light signals." The stipendiary magistrate dismissed the information on the ground that the pedestrian crossing was at the material time being controlled by light signals, and that therefore the proceedings ought to have been brought under another regulation :—

Held, that the magistrate was right in holding that the crossing was at the material time controlled by light signals, and that the driver of the motor vehicle only did what he was entitled to do by the showing of the green signal, namely, proceed and turn to the right.

CASE stated by the stipendiary magistrate for the City of Leeds.

An information was preferred by the appellant, Reginald William Stimson, an inspector of the Leeds City Police,

(1) By the Pedestrian Crossing Places (Traffic) Regulations, 1941 :
" 3. The driver of every vehicle
" approaching a crossing shall,
" unless he can see that there is
" no foot passenger thereon, pro-
" ceed at such a speed as to be
" able if necessary to stop before
" reaching such crossing."

" 4. The driver of every vehicle
" at or approaching a crossing

" where traffic is not for the time
" being controlled by a police
" constable or by light signals shall
" allow free and uninterrupted
" passage to any foot passenger
" who is on the carriageway at
" such crossing, and every such
" foot passenger shall have prece-
" dence over all vehicular traffic
" at such crossing."

against the respondent, Kenneth Pitt, for that he on September 29, 1946, being the driver of a motor vehicle, at a crossing place for foot passengers where traffic was not for the time being controlled by a police constable or by light signals, did not allow free and uninterrupted passage to a foot passenger who was on the carriageway at such crossing, contrary to reg. 4 of the Pedestrian Crossing Places (Traffic) Regulations, 1941, duly made by the Minister of Transport under s. 18 of the Road Traffic Act, 1934, and contrary to the form of the statute in such case made and provided.

At the hearing of the information on November 26, 1946, the following facts were proved or admitted: Duly authorized traffic light signals were installed at the junction of The Headrow and Albion Street in the City of Leeds conforming to the provisions of the Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933. The traffic lights in The Headrow both face east and west, and those in Albion Street both face north and south. At the junction of The Headrow and Albion Street there were duly authorized pedestrian crossings conforming to the provisions of the Traffic Signs (Pedestrian Crossings) (No. 2) Provisional Regulations, 1934, as amended. At the material time the traffic light signals were showing green in Albion Street and red in The Headrow. The respondent was at the material time driving a motor vehicle. While signals were showing as mentioned above a woman pedestrian was walking across The Headrow from north to south between the studs of the pedestrian crossing situate on the easterly side of Albion Street. The respondent at the material time drove his motor vehicle up Albion Street in a northerly direction and after passing the traffic light signal situate on the pavement on the western side of Albion Street, which signal was then showing green, turned right into The Headrow, and knocked the woman pedestrian down when she was nearly half way across the pedestrian crossing. In cross-examination of a witness the respondent stated that his vision had been obstructed by another vehicle passing from north to south of the crossing at the same time.

It was contended on behalf of the appellant that the pedestrian crossing upon which the woman foot passenger was knocked down was a "crossing where traffic is not being controlled by a police constable or by light signals," and that the alleged offence therefore came within the ambit of reg. 4 of the Pedestrian Crossing Places (Traffic) Regulations,

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1941, and that there was a case to answer. In support of this contention it was argued that on the authority of *Chisholm v. London Passenger Transport Board* (1) and having due regard to reg. 28 of the Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933, the only controlled crossing at a junction of this nature was the one which traffic first approaches, because once traffic had passed over that pedestrian crossing with the light showing green in its favour, it was not prevented by any other traffic light, even if showing red, from proceeding left, right or straight on over any of the other crossings at the junction.

The stipendiary magistrate was of opinion that on the evidence there was no case for the respondent to answer; that the pedestrian crossing in question was at the material time "for the time being controlled by light signals"; and that the proceedings ought more properly to have been brought under the provisions of reg. 3 of the Pedestrian Crossing Places (Traffic) Regulations, 1941, and thereupon dismissed the information. At the request of the appellant he stated the case set out above for the opinion of the High Court. The question for the opinion of the Court was whether he had on the above statement of facts come to a correct determination in point of law.

L. A. Blundell for the appellant. The stipendiary magistrate came to a wrong decision. According to the plan annexed to the case The Headrow is at the intersection with Albion Street 53 feet wide and there is in the centre of The Headrow two refuges one on either side of the junction. In those circumstances there are two crossings and not merely one crossing. See *Wilkinson v. Chetham-Strode* (2) and *Chisholm v. London Passenger Transport Board* (3), per Scott L.J. When the respondent had reached the middle of The Headrow the green light being in his favour, he came on to a crossing which was uncontrolled by light signals, and the proceedings against him were properly taken under reg. 4 of the Pedestrian Crossing Places (Traffic) Regulations, 1941.

The respondent did not appear and was not represented.

LORD GODDARD C.J. In this case the respondent was

(1) [1939] 1 K. B. 426.

(3) [1939] 1 K. B. 426, 433.

(2) [1940] 2 K. B. 310

charged with being the driver of a motor vehicle at a crossing place for foot passengers where traffic was not for the time being controlled by a police constable or by light signals, he did not allow free and uninterrupted passage to a foot passenger who was on the carriageway at such crossing contrary to reg. 4 of the Pedestrian Crossing Places (Traffic) Regulations, 1941. Regulation 4 provides that "the driver of every vehicle" at or approaching a crossing where traffic is not for the time being controlled by a police constable or by light signals "shall allow free and uninterrupted passage to any foot passenger who is on the carriageway at such crossing, and every such foot passenger shall have precedence over all vehicular traffic at such crossings." Regulation 5 sets out what the duty of the driver is when he is "approaching a crossing at a road intersection where traffic is for the time being controlled by a police constable" or by traffic lights. The stipendiary magistrate at Leeds dismissed the information because at the place where the accident happened there are four traffic lights, one at each crossing, and therefore the proceedings ought to have been brought under another regulation. It could not be said that the respondent ever approached a crossing where the traffic was not being controlled by light signals because it was a crossing which is controlled by four light signals.

Mr. Blundell has urged every point that can be urged in favour of the appeal, including calling our attention to the case of *Chisholm v. London Passenger Transport Board* (1), but with all respect I cannot agree that that case decides that a crossing intersection where there are four traffic lights is not controlled by light signals. The fact is that when the green light signal enabled the respondent to proceed, it also enabled him to turn right or to turn left when the crossing is controlled by traffic lights. The red light was against traffic from proceeding from The Headrow across Albion Street, and it was because the red light was there that it was possible for the respondent to turn into The Headrow. It is quite clear, in my opinion, on the plain words of the regulation, that this was a crossing controlled by light signals, and therefore the stipendiary magistrate was quite right in dismissing the information.

ATKINSON. J. I agree. I think that interpretation is (1) [1939] 1 K. B. 426.

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assisted by the contrast between reg. 4 and reg. 5. In reg. 4, which deals with a crossing not controlled by light signals, there is no reference to any signal to proceed. But the final words in reg. 5, which imposes an obligation where the crossing is controlled are to give an "uninterrupted passage to every "passenger who has started to go over the crossing before "the driver receives a signal that he may proceed over the "crossing." Take this particular set of lights. The green light was showing for the driver. What did the green light mean? No. 28 of the Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933, made under s. 48 of the Road Traffic Act, 1930, entitled "Significance of the light signals," states the statutory meaning of the green light as follows: "The green signal shall be taken to indicate that vehicular "traffic may pass the signal and proceed straight on or to the "left or to the right with due regard to the safety of other "users of the road." In other words the driver has received a signal that he may do precisely that which the driver in the present case did. How it can be said in view of that that this crossing is not controlled by light signals I cannot see. I agree that this appeal fails and must be dismissed.

OLIVER J. I agree.

Appeal dismissed.

Solicitors for the appellant: *Sharpe, Pritchard & Co., for O. A. Radley, Town Clerk, Leeds.*

R. F. S.

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May 1.

Lord Goddard
C.J.,
Atkinson and
Oliver JJ.

BARNESLEY v. MARSH.

Bastardy—Affiliation summons—Justices equally divided—Direction for hearing by another court—Adjournment—Special order not necessary—Hearing by second court more than forty days after service of summons—Jurisdiction—Poor Law Amendment Act, 1844 (7 & 8 Vict., c. 101), s. 4—Summary Jurisdiction Act, 1848 (11 & 12 Vict., c. 43), ss. 16, 35.

Except in the case of the specific instances in relation to procedural machinery mentioned in s. 35 of the Summary Jurisdiction Act, 1848, the provisions of that Act do not apply in the case of bastardy proceedings, and consequently the powers of adjournment given to justices in such proceedings by s. 4 of the

Poor Law Amendment Act, 1844, are not affected by the provisions of s. 16 of the Act of 1848 which prescribe certain formalities to be complied with by a court of summary jurisdiction on granting an adjournment. In exercising their powers of adjournment under s. 4 of the Poor Law Amendment Act, 1844, it is not necessary that justices should use any particular form of words when granting an adjournment; it is sufficient that the intention should be made clear that the case is to stand over from one court to another.

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CASE STATED by Flint justices.

On September 11, 1946, the respondent, Jean Gloria Marsh took out a summons alleging that the appellant, Anthony John Barnesley was the father of her illegitimate child. The summons was served on the appellant on September 17, 1946, and was heard on October 7, 1946, by six justices who, having heard the evidence, announced that they were equally divided in opinion and intimated that the case should be tried by another court. The case came on for hearing before a different court on December 23, 1946, and it was then contended for the appellant: (1.) that the jurisdiction of the court sitting on October 7 expired on that day; (2.) that the justices then sitting being equally divided ought, (a) to have dismissed the summons, or (b) to have adjourned the hearing in compliance with the provisions of s. 16 of the Summary Jurisdiction Act, 1848, and that having failed to do either, the jurisdiction of the justices expired on October 7; (3.) that, by virtue of s. 4 of the Poor Law Amendment Act, 1844 (1), the respondent was out of time in

(1) Poor Law Amendment Act, 1844, s. 4: "the justices in petty sessions as aforesaid may adjourn the hearing of the case as often as to them may seem fit; but no such order shall be made unless applied for at such petty sessions within the space of forty days from the service of the summons after the birth of the bastard child on the person alleged to be the father of the bastard child . . ."

Summary Jurisdiction Act, 1848, s. 16: "And be it enacted, that before or during such hearing of any information or complaint it shall be lawful for any one justice, or for the justices present, in their discretion, to adjourn the hearing of the same to a certain time and place to

"be then appointed and stated in the presence and hearing of the party or parties, or their respective attornies or agents then present . . ."

Section 35: ". . . nothing in this Act shall extend or be construed to extend to any complaints, orders or warrants in matters of bastardy made against the putative father of any bastard child, save and except such of the provisions aforesaid as relate to the backing of warrants for compelling the appearance of such putative father, or warrants of distress, or to the levying of sums ordered to be paid, or to the imprisonment of a defendant for non-payment of the same . . ."

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applying for an order on December 23, since more than forty days had elapsed since the summons was served on the appellant. It was contended for the respondent: (1.) that, at the hearing on October 7, the justices, being equally divided were not bound to dismiss the complaint and were entitled to direct that it should be reheard before a court differently constituted; (2.) that, although there was no formal order adjourning the court on October 7, it was in fact adjourned; (3.) that the court had power to adjourn the hearing without fixing a date; (4.) that by reason of the provisions of s. 35 of the Summary Jurisdiction Act, 1848, the provisions of s. 16 of that Act, which prescribe formalities to be complied with on an adjournment did not apply to bastardy proceedings; and (5.) that when an application had been made to a court of petty sessions within forty days of the service of the summons, the justices had power to adjourn the hearing without any limit of time. The justices held that they had jurisdiction to hear the complaint and made an order in the respondent's favour. The appellant appealed.

Cartwright Sharp K.C. and *Verne* for the appellant. The justices were wrong in holding that they had jurisdiction to hear the summons on December 23, 1946, since that date was more than forty days after the expiration of the service of the summons on the appellant. The question depends on whether the hearing on December 23 was an adjournment of the hearing on October 7 or whether the case was being heard *de novo*. It is submitted that there was no adjournment of the original hearing since the formalities necessary on granting an adjournment were not complied with. Power to adjourn is given to justices in bastardy proceedings by s. 4 of the Poor Law Amendment Act, 1844, but s. 16 of the Summary Jurisdiction Act, 1848, provides that "before or during the hearing of any information or complaint it shall be lawful for the justices present in their discretion to adjourn the hearing of the same to a certain time and place to be appointed and stated in the presence and hearing of the party or parties, or their respective attorneys or agents then present" A similar provision is to be found in s. 7 of the Bastardy Laws Amendment Act, 1873. When the justices stated on October 7 that the case would be heard by another court, they said nothing about the time and place of such fresh hearing in the presence of the parties or their representatives. *Fitzgerald's* case (1) shows

(1) (1869) L. R. 5 Q. B. 7.

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that the granting of an adjournment is a formal matter which must be dealt with formally. It was the duty of those representing the respondent to see, either that there was a formal adjournment on October 7 in accordance with the provisions of s. 16 of the Act of 1848, or, if there was no adjournment, that the second hearing took place within forty days of the service of the summons on the appellant. Neither of these requirements was complied with and consequently, on December 23, the justices had no power to make any order at all. (They also referred to *In re Boynton* (1).)

[The court intimated that they only desired to hear counsel for the respondent on the question whether the provisions of the Summary Jurisdiction Act, 1848, applied.]

Arthian Davies for the respondent. The provisions of s. 16 of the Act of 1848 do not apply in the case of bastardy proceedings. Section 4 of the Poor Law Amendment Act, 1844, gave power to justices in such proceedings to adjourn as often as to them might seem fit, but prescribed no formalities to be followed. In 1848 the Summary Jurisdiction Act of that year was passed, which dealt with the general jurisdiction of courts of summary jurisdiction in criminal matters properly so called, and in s. 16 prescribed formalities to be followed on the occasion of an adjournment, which would appear to be more appropriate to the case of criminal proceedings properly so called than to quasi-criminal proceedings. Further, s. 35, of the Act specifically says that the Act is not to extend to any complaints, orders or warrants in matters of bastardy except certain procedural matters referred to in the section. Apart from these, the Act has no concern with bastardy proceedings for which there already existed a code in the earlier Act of 1844, and, consequently, the power to adjourn given to justices by s. 4 of that Act, is unaffected by the provisions of s. 16 of the Act of 1848. (He referred to *Bagg v. Colquhoun* (2).)

LORD GODDARD C.J. On September 11, 1946, the respondent issued a summons against the appellant alleging that he was the father of her bastard child, and the summons was served on the appellant on September 17. Section 4 of the Poor Law Amendment Act, 1844, some of the sections of which remain in force and unaffected by later legislation, provides that no order such as was asked for in the present case shall be made unless applied for within the space of forty days from the service of

(1) (1850) 1 L. M. & P. 12.

(2) [1904] 1 K. B. 554.

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the summons. The hearing came on before the justices on October 7, 1946. There were six justices and, as sometimes happens when a court is composed of an even number, there was an equal division of opinion. This case affords another illustration of how desirable it is that there should not be sitting in any court, if it can be avoided, an even number of persons adjudicating. That principle is observed in the highest courts of the land because it is now a rule of practice in the House of Lords and the Judicial Committee of the Privy Council that they will not sit except in an odd number. The House of Lords, now, is always constituted of five members, and the Judicial Committee (although in some Indian appeals it sits with three members) also endeavours to have five members sitting. If it so happens that a member of their Lordships' house falls ill and is unable to be present so that there are only four Lords of Appeal in attendance, their Lordships do not sit till there are five. It is a very good rule for all courts to endeavour to secure, by having an uneven number of members, that when the court comes to adjudicate on a matter, the views of the majority shall prevail, if there is a division of opinion. In the present case the justices being equally divided, announced that fact and said that another court must hear the case. They did not say whether the new court should be one consisting of themselves and another justice, or that they would re-hear the case with an uneven number. It would not have been a satisfactory thing for one of the justices to have retired and then for the uneven number to have heard the case, nor would it have been very satisfactory if they had added another justice to their numbers. In fact they took the proper course of prescribing that the case should come before justices of the County of Flint, but different justices. The case came on before these different justices on December 23, 1946, and objection was taken on behalf of the respondent, who perhaps had no other defence, that the proceedings were out of time because forty days had elapsed since the service of the summons. The answer made on behalf of the applicant was that she had applied for the order within forty days of the original hearing of the summons and that the hearing on December 23 was merely an adjournment of her original application. It was contended before us by Mr. Cartwright Sharp that in fact there was no adjournment and that if there were, it was not in accordance with the law because the provisions of s. 16 of the Summary Jurisdiction Act, 1848, applied. As to whether there was an

adjournment or not, in spite of some ruling which the clerk to the justices was invited to give, we are of opinion that there clearly was an adjournment. It is not necessary for the purpose of adjourning a case, to use any magic language or any particular form of words, all that is necessary is to see what the court does. Very often one may have to pay attention to what a court says in order to find out what it proposes to do, but when it is quite clear that the court intends a case to stand over from one hearing to another, obviously they are adjourning the case whether they say "We adjourn it" or "the case will go to another day" or use any other words or take any other steps which show that what they mean to do is to adjourn the case no matter what form of words they use. I may add that if the justices had purported, on an equal division of opinion to dismiss the case, there would have been an end of it, but when they have clearly given no decision at all and do not dismiss the summons and make reference to a further court, obviously they are adjourning the case, and that is what they did in the present case. It is said, however, that if the justices did intend to adjourn, they did not do so in accordance with the law because s. 16 of the Summary Jurisdiction Act, 1848, provides that "before or during the hearing of any such information or complaint it shall be lawful for any one justice or for the justices present in their discretion, to adjourn the hearing of the same to a certain time and place to be then appointed and stated in the presence of the party or parties or their respective attornies or agents then present" In considering that section I desire to reserve my opinion on the question whether an adjournment *sine die* could be granted under it in a criminal case to which the section applies. It is not necessary to decide that point in this case because I think it is as clear as anything can be that the Summary Jurisdiction Act, 1848, does not apply to bastardy proceedings except in a few specially named matters. In the first place it is to be remembered that in 1844, only four years before the passing of the Summary Jurisdiction Act, 1848, a Poor Law Amendment Act was passed which dealt in a good many sections with bastardy proceedings and was, for some years, the only code of procedure in that class of case. Section 4 of that Act provides that justices in petty sessions may adjourn the hearing of a case as often as to them may seem fit. There is nothing in the Act of 1844 which requires a certain time or place to be mentioned. Four years later the Act of 1848 was

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passed and by s. 35 provided : " Nor shall anything in this " Act extend to any complaints, orders, or warrants " in matters of bastardy made against the putative father of any " bastard child, save and except such of the provisions aforesaid " as relate to the backing of warrants for compelling the " appearance of such putative father or warrants of distress, " or to the levying of sums ordered to be paid, or to the " imprisonment of a defendant for non-payment of the same." That section seems to me to say in the clearest possible way that except in the particular matters to which it makes reference the Act of 1848 does not apply in the case of bastardy proceedings. It is true that bastardy proceedings before justices are summary proceedings and are started by complaint and that the Act of 1848 deals with such matters, but when that Act was passed, there was already in existence a statute dealing with bastardy proceedings which rendered the Act of 1848 inapplicable in the case of such proceedings except in certain specified matters. In the Bastardy Laws Amendment, 1873, there is a provision in s. 7 in relation to the question of adjournment, to the effect that if there are not two justices present, so that the case cannot be heard at all, it shall be lawful for any one justice present to adjourn the hearing to a certain time and place to be then appointed in the presence of the party or parties or their respective counsel, attornies or agents then present. In other words in that case the legislature has adopted very much the same language as was used in s. 16 of the Act of 1848. It seems to me that in such a case there is very good reason for the appointment of a particular day for an adjournment because the order has to be applied for within forty days of the service of the summons and the section gives the court power to adjourn so that it could not be said that the applicant had not applied for the summons within the specified time. No doubt the legislature thought that as there was a time limit in existence, it was desirable, when the case had never been heard at all, to fix a particular time so that it should not go on standing over more or less indefinitely. However, s. 7 obviously does not apply in this particular case, because here, there had been a hearing before the justices. The one useful purpose that this case may serve is to call the attention of courts of summary jurisdiction to the fact that bastardy stands by itself, so far as its code of procedure is concerned, and does not come within the provisions of the Summary Jurisdiction Acts of 1848 or 1879 except in respect of provisions which those acts specially

apply to bastardy. Accordingly, it follows, in my opinion, that on December 23, the justices had power to deal with this case as a matter which had been adjourned from the previous hearing on October 7, and the appeal must therefore be dismissed.

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ATKINSON J. I agree and will only add a few words. I am quite satisfied that there was an adjournment. The point has been made that the word "adjourn" was not used by the justices at the hearing on October 7, but it seems to me that since the decision in *Fussell v. The Licensing Committee of the Justices of Somerset* (1) the point taken cannot be maintained. My Lord said in that case: "There is no question but that, if at the hearing of an application for a licence the justices are equally divided, and therefore say that they refuse the application because a majority of the justices are not in favour of granting the licence, that amounts to an adjudication refusing the licence; but, in this case, I think it is clear that what the justices meant was: 'We are not going to give a decision in this case; we are going to adjourn it so that it may be heard by a larger bench and then a decision can be given'." It seems to me that exactly the same thing can be said in this case. It is quite clear that on October 7 the justices were not determining the case. What they meant was "We are not going to give a decision because we are equally divided; we are going to adjourn it and let it stand over to whatever date you will so that it may be heard by a different bench, and then a decision can be given." That amounts to an adjournment, and I think there was an adjournment in the present case. But even if there was not an adjournment, I do not see that the case is any different. The application for the order not having been finally dealt with, remained. It was not an application to the justices sitting on a particular day, but to the petty sessional court and when it was in fact heard on December 23, it was an application made on some date in September which had not yet been dealt with finally. It, therefore, appears to me that the order made on December 23 had been applied for within the space of forty days from the service of the summons, and on that ground it seems to me that the order made was a perfectly good one.

OLIVER J. I agree. I cannot interpret what the justices

(1) Ante p. 276.

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did at the first hearing as anything but an adjournment. They expressly said that the case would be adjudicated upon by some other court of their own sessions, and that is a thing that any petty sessional court may fairly do. If that is not an adjournment I do not know what is. I also entirely agree with the two judgments which have preceded mine. Section 16 of the Summary Jurisdiction Act, 1848, does not apply to this case. That is due not only to the express language of s. 35 of the Act, but also to the fact that the Poor Law Amendment Act, 1844, had, only four years before the passing of the Summary Jurisdiction Act, 1848, enacted a whole code of procedure in bastardy matters. It would be most natural for the legislature, when passing the Act of 1848, to take the view that it was unnecessary to interfere with the provisions of the Act of 1844, and they therefore left them alone, except in regard to certain matters of procedure specifically referred to in the Act of 1848. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Nicholson, Graham & Jones, for Wayne & Co., Birmingham.*

Solicitors for the respondent: *J. Kerfoot-Roberts & Son, Holywell.*

P. B. D.

1947
Apr. 17.

THE KING v. ESSEX JUSTICES. *Ex parte* EAST HAM BOROUGH COUNCIL.

Lord Goddard
C.J.,
Atkinson and
Oliver JJ.

Highway—Diversion—Requirements of statute complied with—Enrolment of certificate of justices—No appeal by persons aggrieved—Right of quarter sessions to refuse enrolment on ground that new highway not more commodious than old highway—Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 84, 85, 88, 89 and 91.

On proceedings being taken under s. 85 of the Highway Act, 1835, for the diversion of a highway, a request was made to quarter sessions to enrol the certificate of justices for the diversion of the highway. Quarter sessions, although expressing themselves satisfied that all the formalities required by the statute with regard to notices, view by the justices, etc., had been complied with, declined to enrol the certificate on the ground that the proposed new highway was not more commodious than the old highway. There had been no appeal to quarter sessions by persons who considered themselves aggrieved by the diversion:—

Held, that as there had been no appeal against the certificate of justices, quarter sessions were bound under s. 91 of the Highway Act, 1835, to order the certificate to be enrolled, and they had no jurisdiction to consider the question whether or not the proposed new highway was more commodious to the public as that question, in the event of an appeal, would have had to be determined by a jury.

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MOTION by the East Ham borough council for an order of mandamus directed to the quarter sessions for the county of Essex directing them to enrol a certificate of justices diverting a highway under ss. 84 and 85 of the Highways Act, 1835. The road in question was in the county borough of East Ham, and when the matter came before the quarter sessions that court said that they were satisfied that all formalities with regard to the notices, view by the justices, etc., had been complied with but they declined to enrol the certificate, because, in their opinion, the new highway was not more commodious than the old highway. The reasons which they gave for their decision were that the new highway set out on the plan involved two right-angle turns instead of a straight road through, and they thought that where the traffic taking those turns would debouch into another road the position was unsatisfactory as compared with that afforded by the old road. On those grounds they expressed the opinion that the certificate was bad on its face, and, accordingly they refused to enrol it, at the same time saying that they would welcome the guidance of the High Court.

H. C. Leon and *I. H. Jacob* for the East Ham borough council. The Highway Act, 1835, sets out the procedure which is to be followed in order that a public highway may be diverted or stopped up. Section 84 provides that previous to a highway being stopped up, diverted or turned the surveyor shall request two justices to view the same. Section 85 sets out the proceedings for diverting a public highway. Notices have to be affixed at each end of the highway, and to be inserted in a newspaper published or generally circulated in the county, and to be affixed to the door of the church of every parish in which the highway purported to be diverted shall lie, and a plan describing the old and the proposed new highway by metes, bounds and admeasurement thereof certified by a competent surveyor shall have been delivered to the justices who shall certify the fact of their having viewed

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the highway, and that the proposed new highway is nearer or more commodious to the public, and the certificate of the justices, together with the proof and plan, shall be lodged with the clerk of the peace of the county in which the highway is situated, and the certificate of the justices having been read in open court by the clerk of the peace, shall together with the proof and plan be enrolled by the clerk of the peace among the records of the court of quarter sessions. Section 88 provides that any persons who may think themselves aggrieved if such highway should be ordered to be diverted and turned or stopped up may appeal to quarter sessions. Section 89 provides that in case of such appeal the justices at quarter sessions shall for the purpose of determining whether the proposed new highway is nearer or more commodious to the public, or whether the public highway so intended to be stopped up is unnecessary or whether the party appealing would be injured or aggrieved, empanel a jury of twelve disinterested men to serve as jurymen to determine the question. Section 91 provides that if no appeal be made, or being made shall be dismissed then the justices at quarter sessions shall make an order to divert, turn and stop up such old highway, and the new highway so to be appropriated and set out shall be and for ever after continue a public highway. Under that Act the duty of quarter sessions was to see that the certificate was in order and that all the formalities required by the statute had been complied with. They expressed themselves as satisfied that they had been complied with and it then became their duty to order the certificate and plan to be enrolled in the records of the court. It was not for them to say whether or not the proposed new road was more commodious for the public than the old highway. That question would, in the event of an appeal, have to be decided by a jury, and would not arise at all if there were no appeal. In the present case, the justices at quarter sessions have gone outside their jurisdiction and have taken upon themselves the rights and duties of a jury.

The Essex justices were not represented.

LORD GODDARD C.J. stated the facts and continued: The Highways Act, 1835, provides what is to be done where it is proposed either to stop up or divert a highway. I need not go through all its various provisions, but if two justices, who have to view the highway under ss. 84 and 85, approve the

application, a certificate is prepared which must show that the justices have been satisfied and all the various steps and conditions precedent to quarter sessions enrolling the certificate have been properly carried out. Provision is also made for the depositing with the clerk of the peace of the certificate and the plan before the application comes to quarter sessions, so that any person who is aggrieved may appeal to quarter sessions. The only ground, apparently, on which quarter sessions can refuse to enrol the certificate, where there is no appeal, is if they see on the face of the certificate that the proceedings have not been in order. It is their duty, as was pointed out by Coleridge J. in *R. v. Worcestershire JJ.* (1), to satisfy themselves that the provisions of the statute have been complied with, and, if they are satisfied that the provisions of the statute have been complied with, it is not for this court or any other court to question their decision on these matters. The only way in which the certificate can be attacked is by a notice of appeal being served, and the quarter sessions have then to empanel a jury to decide whether or not the road is equally convenient, or more or less convenient, and generally whether or not it is desirable in the public interest that the closing order or that the diversion order should be made. The matters on which the quarter sessions acted in this case are matters on which they would have had to have taken the opinion of a jury, if anyone had appealed, but, in fact no-one did appeal. One point that occurred to me in the course of the case, and about which I felt considerable doubt, was that it seems to me, that the plan which has been deposited and has to be enrolled in the county records along with the certificate in certain respects does not comply with the statute. If the quarter sessions had taken that point and refused to enrol the plan I do not think this court could have interfered, but a statement of the decision of quarter sessions which has been submitted to the chairman shows that quarter sessions declared themselves satisfied with the plan and that all necessary preliminaries and conditions precedent had been complied with. That being so, the only question that is left is whether it was a good ground on which quarter sessions refused to enrol the certificate. For the reasons I have given it seems to me it is not, because the justices in quarter sessions cannot themselves decide the question of convenience or adequacy. That is a question which can only be decided by a jury. I have

(1) (1854) 3 E. & B. 477.

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had some doubts whether we ought to order a plan which, in my opinion, does not comply with the provisions of the statute, to be enrolled, but the matters in which the plan does not comply with the statute are trifling and no point has been taken by quarter sessions. It appears that the plan adequately represents that which is proposed to be done, and gives adequate information to the public who choose to investigate it, though I do not suppose they will. In those circumstances an order for mandamus will go.

ATKINSON J. I agree. The duty of the justices at quarter sessions when a certificate is lodged with the clerk of the peace is clearly defined in *R. v. Worcestershire JJ.* (1), where Coleridge J. said (2): "This certificate when lodged with the clerk of the peace in order to inspection and subsequent enrolment, may be either appealed against or not. If the latter s. 91 of the statute comes into operation, and the justices at sessions must make their order for diverting or stopping up as the case may be." Then he proceeded to deal with the position if the certificate did not clearly cover all the ground—for instance, if the plan did not contain the necessary measurements—and he goes on: "These consequences are so serious, that we conclude that it is the duty of the sessions where there is no appeal, to be satisfied that the certificate comes before them correct on its face, and accompanied by plan and proof, such as the statute requires. Unless this be done, neither the public, nor interested individuals, will have the protection which the statute intended. But, if this be the duty of the justices at sessions and within their competence, when there is no appeal, how can it be maintained that, when there is an appeal, it is a less a part of their duty, and not within their competence, to decide upon the very same questions if presented to them by the appellant. It must be trusted to the court to determine what apparent defects are merely formal and no grievance, and what are substantial." In *R. v. Surrey Justices* (3) Channell J. said: "Moreover the question whether the certificate and plan, which they are asked to enrol, comply with the requirements of the section is a matter which the magistrates have to inquire into. And, therefore, even if in our opinion they had been wrong, the case would

(1) 3 E. & B. 477.

(2) *Ibid.* 489, 490.

(3) [1908] 1 K. B. 374, 377.

"not be one for a mandamus." That means that the view of quarter sessions is final in matters of that sort. It seems to me that once quarter sessions had expressed the view that the certificate and plan were in accordance with the requirements of the Act, their duty was to order the enrolment of the certificate and that they had no power to consider whether or not they agreed with the opinion formed by the two justices who had viewed the highway. I agree that this mandamus ought to go.

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OLIVER J. I agree. Once it is established that the certificate, the plan and the notice which came before quarter sessions are in order, then, if there is no appeal, by virtue of s. 91 of the Act, quarter sessions have no option to do anything else except enrol the certificate. I agree that the mandamus should go.

Order for mandamus.

Solicitors for borough council: *Duthie, Hart & Duthie.*

R. F. S.

PRUDENTIAL STAFF UNION v. HALL.

1947
Mar. 21 ;
Apr. 1.
Morris J.

Insurance—Burglary and house-breaking—Policy effected by union on behalf of members—Insurance of moneys held by members as agents of insurance company—Alleged loss by member—Right of union to sue underwriter—Insurable interest—Insurance on "goods"—Estoppel—Life Assurance Act, 1774 (14 Geo. 3, c. 48), s. 4.

A union, whose members consisted of members of the staff of an insurance company, effected a policy of insurance with Lloyds' underwriters covering the loss by any of its members, who should be members during the currency of the policy, by certain perils, including burglary and house-breaking, of any moneys held by them as agents or collectors of the company. In the policy the union was described as "the assured" and the underwriters contracted to pay the union in case of a loss occurring within the policy. The underwriters had previously paid the union in respect of claims made on behalf of members and had represented that it was proper for the union to present such claims. The union received 3s. from each member in respect of the insurance and paid the underwriters by way of premium 2s. 6d. for each member. In an action by the union against one of the underwriters in respect of an alleged loss by burglary of moneys held by two of its members for the company, the defendant pleaded that the union had no

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cause of action and that the action should have been brought by the members who claimed to have suffered the loss:—

Held (1.) that the defendant was not estopped from contending that the union was not entitled to sue either because previous claims had been made by and payment made to the union or because of previous representations by the underwriters that it was for the union to present claims; (2.) that the union had no insurable interest in the moneys insured either by reason of its obligation to its members to insure or by reason of its general concern for the welfare of its members; (3.) that the union was nevertheless entitled to sue, because the underwriters had contracted in the event of a loss to pay the union, who would thereupon become trustees for the member or members concerned of any amount recovered; and (4.) that the Life Assurance Act, 1774, did not apply to make the policy void, since, for the purposes of the policy, moneys were "goods" within the meaning of that Act and insurances on goods were excepted therefrom.

ACTION.

By a policy of insurance dated June 19, 1944, effected by the plaintiff union with Lloyds' underwriters, of whom the defendant was one, the insurers agreed to indemnify the plaintiff union in respect of the loss by certain specified perils of any moneys held by members of the union as agents or collectors of the Prudential Assurance Company and for which such members were responsible to the company. The perils insured against included burglary and housebreaking from any office or private dwelling-house normally occupied in the British Isles. In the policy the plaintiff union was described as "the assured" and there was a clause binding the insurers to pay the assured in the case of a loss. The policy covered losses by any persons who were members of the union during the currency of the policy and not merely persons who were members when the policy was effected. The plaintiff union paid to the underwriters by way of premiums 2s. 6d. in respect of each member. The union received 3s. from each member for effecting the insurance, the balance of 6d. being charged to expenses.

The plaintiff union claimed that on or about May 15, 1945, a Mr. and Mrs. Wade, who were members of the union at that time, although they had not been members at the date of the policy, had in their possession on behalf of the company the sums of 72l. os. 6d. and 93l. 2s. 1d. respectively, and that on the night of May 16, 1945, those sums were stolen from their dwelling-house by burglary and had not been recovered. They therefore claimed to be indemnified by the underwriters in

respect of the loss and brought this action against the defendant in respect of his share.

By his defence the defendant denied the burglary and claimed that in any event the plaintiff union had no cause of action against him.

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Martin Jukes for the plaintiff union. The contract of insurance was made by the plaintiffs as agents for Mr. and Mrs. Wade. In general, where a contract is made by an agent, although the principal, who has authorized or ratified the contract, can sue, so can the agent. Therefore the plaintiffs can bring this action as agents. In any case they are entitled to sue as trustees, since their members are in the position of cestui que trust. If Mr. and Mrs. Wade had been plaintiffs, it might have been said that they were not members at the date of the policy. The plaintiffs had an insurable interest: if for no other reason the fact that they were bound to insure on behalf of their members gave them an insurable interest: *Heckman v. Isaac* (1). Further, they have a general concern for the welfare of their members. In any case, it is not strictly necessary that they should have an insurable interest. That is only necessary in cases falling within the Life Assurance Act, 1774 (2); but that Act does not apply to insurances on goods and this was an insurance on goods. [He referred to *Williams v. Baltic Insurance Association of London, Ltd.* (3).] Apart from these matters the defendant is estopped from saying that the plaintiffs cannot sue by reason of the conduct of the underwriters who have previously paid the plaintiffs in respect of claims under the policy and in the course of correspondence preceding this action have represented that the union were the right persons to make such claims. That representation was intended

(1) (1862) 6 L. T. 383.

(2) Life Assurance Act, 1774,
s. 1: "No insurance shall be made
" by any person or persons, bodies
" politic or corporate, on the life
" or lives of any person or persons,
" or on any other event or events
" whatsoever, wherein the person
" or persons for whose use, benefit,
" or on whose account such policy
" or policies shall be made, shall
" have no interest and
" every assurance made
" contrary to the true intent and

" meaning hereof shall be null and
" void"

Section 4: "Provided always,
" that nothing herein contained
" shall extend, or be construed to
" extend, to insurances bona fide
" made by any person or persons
" on ships, goods, or merchandises;
" but every such insurance shall
" be as valid and effectual in the
" law as if this Act had not been
" made."

(3) [1924] 2 K. B. 282.

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to be acted on and has been acted on, and the defendant cannot now say that the plaintiffs are not the right persons to bring this action.

H. G. Robertson for the defendant. There is no possibility of estoppel operating to prevent the defendant from relying on his defence in this case that the plaintiff union are not the right persons to bring this action. The plaintiffs have no insurable interest and it is impossible to say that insurance of money is an insurance on goods. Therefore *Williams v. Baltic Insurance Association of London, Ltd.* (1), does not apply. The only interest which the plaintiffs have in this insurance is an interest in carrying out their duties to effect an insurance for their members. They do not undertake themselves to indemnify or insure their members. The insurance which they have effected is like an insurance effected by a solicitor for his client : they have no insurable interest in the subject matter of the policy. [He referred to *Macaura v. Northern Assurance Company, Ltd.* (2) and *Vandepitte v. Preferred Accident Insurance Corporation of New York* (3).] The union itself has suffered no loss and is under no liability, and therefore cannot claim to be indemnified by the defendant under the policy.

Martin Jukes replied.

Cur. adv. vult.

April 1. MORRIS J. By para. 3 of the defence, it was pleaded as follows : " The defendant will further submit that " in any event the plaintiffs have no cause of action against " him." In amplification of this plea, Mr. Robertson, for the defendant, submitted that if a claim was made under the policy, it should have been pursued at the instance of Mr. and Mrs. Wade as personal plaintiffs, and that it could not be presented by the union. In furtherance of this contention, Mr. Robertson urged, firstly, that the union had no insurable interest, and therefore, could not sue, and, secondly, that they had suffered no loss and, accordingly, could not claim the benefit of a contract of insurance which is a contract to indemnify. In reply to this contention, a number of submissions were made by Mr. Martin Jukes. In general, he submitted that, although, if the contract is made by an agent, the person who authorizes or ratifies it can sue upon it, even so an agent who contracts personally can sue upon the contract. He sub-

(1) [1924] 2 K. B. 282.

(3) [1933] A. C. 70.

(2) [1925] A. C. 619.

mitted that the union had, as a union, an insurable interest in the moneys insured. He further submitted that at common law no insurable interest is necessary, but that it is only necessary if the Life Assurance Act, 1774, applies, which he contended was not the case here, because the insurance was effected on "goods." He also submitted that the defendant was estopped from relying on the plea that the claim could not be presented by the plaintiff union. In elaboration of this contention, the evidence was referred to, which showed that previous claims under the policy had been presented by the union, and cheques in satisfaction of claims had been made out to the union. It was also urged that the underwriters had, by their past conduct and also in the correspondence preceding this action, represented that it was for the union to present claims, and that, on the faith of such representation, the union had altered their position to their prejudice by bringing this action. This matter was not pleaded, but, in my judgment, the contentions in support of it are not sustainable. On any view, it was appropriate that the union should present claims to the underwriters, and if the union merely occupied the position of an agent such procedure would be natural. The course of events followed in cases where liability was met would not be decisive of the question as to who should properly be plaintiffs in a contested action at law. In my judgment, there is no estoppel which operates to prevent the defendant, as an underwriter to the policy, from contending that the plaintiffs are in any event not entitled to sue.

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The submission that the plaintiffs, as a union, have an insurable interest in the moneys insured is, in my judgment, also unfounded. It was said that the union receive 3*d.* a month from each member who is to be covered, and that the union, out of the 3*s.* so received in a year, pay 2*s.* 6*d.* per member to the underwriters, and effect a policy as a result of the obligation so to do which is owed to the members. Those circumstances, however, do not, in my judgment, give the union an insurable interest in the moneys insured. They merely point to the fact that there is a duty on the union to effect arrangements with underwriters. Nor is there, in my judgment, any greater validity in the submission that there is an insurable interest deriving its origin from the general concern for the welfare of its members, which is to be expected in a trade union.

On behalf of the defendant underwriter, it was submitted that Mr. and Mrs. Wade should have been plaintiffs. Mr. and

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Mrs. Wade were not, however, members of the union at the date of the policy, and, in view of this, it was submitted, on behalf of the plaintiff union, that there would be difficulties in regarding them as principals on whose behalf an agent had contracted, and also difficulties in their purporting to ratify the contract made. If, in future cases similar to the present one, individual members bring claims as personal plaintiffs, the underwriters to this policy will presumably not demur; but the question raised is not whether Mr. and Mrs. Wade could have been plaintiffs in whose favour the court could give judgment (on which I express no opinion), but whether judgment can, if the case is proved, go in favour of the plaintiff union. The contract of insurance in issue in this case must be construed in accordance with the ordinary rules of contract, subject only to any statutory provisions which have application. The contract purports to be, and is expressed to be, one made with the Prudential Staff Union. Many parts of the contract point to this conclusion. The contract begins with the words: "Whereas the Prudential Staff Union (hereinafter called 'the 'assured')." Later in the contract are the words: "Now know ye, we the underwriters, members of the syndicates whose definitive numbers in the schedule hereto are set out in the table overleaf, or attached overleaf, hereby bind ourselves, each for his own part and not one for another, our heirs, executors, and administrators, and in respect of his due proportion only, to pay or make good to the assured or to the assured's executors, administrators, and assigns." and so on. The contention on behalf of the defendant involves that a contract which expressly provides that the defendant is to pay the Prudential Staff Union must be construed as one in which the Prudential Staff Union have no right to sue. Printed in red on the contract is a cancellation clause, the first sentence of which is as follows: "This policy may be cancelled at any time at the request of the assured in writing to the broker who effected the insurance, and the premium hereon shall be adjusted on the basis of the underwriters receiving or retaining the customary short term premium." In my judgment, that must refer to the Prudential Staff Union. There is a further clause in these words: "If the assured shall make any claim knowing the same to be false or fraudulent . . . this policy shall become void and all claims thereunder shall be forfeited." In my judgment, the defendant and the other underwriters made a contract with the plaintiff union, by which

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they undertook to insure all the members of the union in respect of losses of moneys collected or held by members which resulted from the occurrence of the prescribed perils. The various clauses of the schedule to the policy, and, in particular, the clause under the head "Premium Basis," make it clear that the subscribing underwriters were contracting with the union to insure all those who should be members of the union during the currency of the policy, even if they were not members when the policy was effected. No point was taken that the words "claims which may be made upon them by the Prudential Assurance Company, Ltd., arising out of their conditions of employment" ought to be given any restricted or limited meaning, and therefore if the moneys held by Mr. and Mrs. Wade had been stolen by some burglar, or housebreaker, prima facie there was a claim under the policy which could be presented by the person entitled to sue. In my judgment, the alleged loss is one in relation to which the union are entitled to sue, because the defendant contracted to pay to the union. No doubt the union would regard themselves as trustees for the particular members of any amount recovered, so that those members could pay such amount in settlement of any claims made on them by their employers for moneys received or held on their behalf: see *Vandepitte v. Preferred Accident Insurance Corporation of New York* (1). In my judgment, the construction of the contract leads to this view.

It is, however, necessary to look at the matter somewhat further, in order to consider whether the policy entered into by the underwriters must be regarded as unlawful and void by reason of the Life Assurance Act, 1774. Mr. Jukes submitted that that Act did not apply for the reason that the insurance should be regarded as one on goods. If the Act applies, it is difficult to see how Mr. and Mrs. Wade could sue, for they are not named in the policy, as required by s. 2 of that Act, but, in my judgment, the reasoning of Roche J. in *Williams v. Baltic Insurance Association of London, Ltd.* (2), applies to the present case. Whatever may be the meaning of the words "or on any other event or events," which are in the Act, it is clear that insurances bona fide made on ships, goods, or merchandise are not affected by the Act. In my judgment, the present policy was just as much a policy on goods as was the policy in *Williams v. Baltic Insurance Association of London, Ltd.* (2), or the policy in *Waters and Steel v. Monarch*

(1) [1933] A. C. 70, 79.

(2) [1924] 2 K. B. 282.

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Fire and Life Assurance Company (1). The present policy was a policy on moneys in a form in which such moneys could physically be burned or asported. For some purposes, it may be that moneys are not to be regarded as goods, but, in my opinion, moneys as defined for the purposes of this policy are "goods" as that word in its context, and having regard to the scope and purview of the enactment, is used in the Life Assurance Act, 1774.

On the facts the learned judge found that the alleged loss was not proved and on that ground gave judgment for the defendant.

Judgment for defendant.

Solicitors for plaintiff union : *J. H. Milner & Son.*

Solicitors for defendant : *J. G. Bosman, Robinson & Co.*

(1) (1856) 5 E. & B. 870.

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HEARD *v.* BRYMBO STEEL COMPANY LIMITED AND OTHERS.

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Mar. 26, 27,
 28, 31.

Morton,
 Tucker and
 Somervell L.JJ.

Electricity (Supply)—Undertaker's breach of regulation—Resulting personal injuries—Right of action—Electricity Supply Regulations, 1937 (made by the Electricity Commissioners under the Electricity Supply Acts, 1882–1936), regs. 25, 39.

A person injured through a breach by an electricity undertaker of the Electricity Supply Regulations, 1937, made by the Electricity Commissioners under the Electricity Supply Acts, 1882–1936, has a right of action against the undertaker in respect of the breach, independently of any question of negligence.

The factory at which the plaintiff was employed was supplied with electricity from a sub-station of the electricity undertakers for the district. A switch at that sub-station controlled the flow of electricity to the employers' factory and was supposed to be so set as automatically to cut off the current, or to "trip," if a defect developed in the line carrying current from the sub-station to the factory. Current entered the factory by a central switch which was intended to be so set that it would trip if a defect developed in the electricity system of the factory. Its tripping would thus cut off all current from the factory and prevent further danger, and if that control switch and the switch at the sub-station were properly set, the former, in the event of a defect in the factory, would trip before the latter. In fact, however, a short circuit having caused an explosion in the factory, the

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

control switch failed to trip, while the switch at the sub-station tripped. An employee of the undertaker having a few minutes later re-engaged the switch at the sub-station, current flowed back into the factory, causing a second explosion which injured the plaintiff while he was investigating the first. The control switch at the factory belonged to and was under the control of the undertakers.

Held, that the employers were in breach of reg. 1, of the Electricity Regulations, 1908, since the first short-circuit and explosion in the factory had occurred because the insulator at that point had not been "so maintained as to prevent danger"; that they were also in breach of that regulation in that the control switch at the factory was not properly maintained or set; that the undertakers were in breach of reg. 25 (a) of the Electricity Supply Regulations, 1937, in respect of their failure to maintain either the control switch at the factory or the switch at the sub-station in a safe condition or properly set; that the employers and the undertakers were liable to the plaintiff for their respective breaches of regulation; and that, while each must be held liable to the plaintiff for the full amount of the damages, as between themselves the damages should be borne as to one-third by the employers and as to two-thirds by the undertakers.

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APPEAL from Wrottesley J.

The facts were stated by Somervell L.J., substantially in the following terms. The plaintiff was a maintenance electrician employed by the first defendants, Brymbo Steel Co., Ltd. On October 2, 1944, he was injured by an explosion caused in or by the electric supply system in the employers' works, that electrical supply coming from the power station of the second defendants, North Wales Power Co., Ltd. The plaintiff claimed against each company and alleged liability at common law and under statutory regulations, one set of which was applicable to the employers, the other to the power company. The judge found in favour of both companies and dismissed the claims of the plaintiff, who now appealed.

At about 6.45 p.m. an explosion occurred on the switchboard near which the plaintiff was sitting. As a result of that explosion the switch in the power company's power house was automatically opened, so that no electricity came into the employers' factory, and the whole place was, therefore, in darkness. The plaintiff went to investigate the switchboard from which the explosion appeared to have come. There was dense smoke and the smell of burning, and, after two or three minutes, he decided to telephone to the sub-station. At that

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moment a second explosion occurred because a servant of the power company at the sub-station, where the supply line had been broken by the automatic switch, turned on the electricity again. It was the second explosion which caused the plaintiff's injuries.

Electrical energy came to the employers' factory from two, possibly three, power stations, belonging to the power company, that concerned being called the Harwarden Sub-Station and some nine miles from the employers' factory. The supply lines from that sub-station led to a switch at the factory called No. 1 switch, through which all the electricity used by the employers passed. From that switch, the electricity passed through two transformers, arranged in parallel, so that current could flow through both at the same time. The two leads from those two transformers passed to switches No. 2 and No. 3, and thence to a busbar, from which, through a number of switches, current passed to various parts of the factory. No. 4 switch controlled current going to a part of the factory called Merchant Mill.

All the switches had an automatic circuit breaker, whereby, if the load became excessive or a fault or short-circuit developed, the current became cut off. The switch concerned would "trip," and the electrical supply previously flowing through it could be cut off. Those devices could be set to operate at varying intervals of time. The switch at the Harwarden power station which controlled only the electricity to the employers' factory could be timed and should have been timed so as not to trip until switch No. 1 tripped, so that, if a fault caused switch No. 1 to trip, current would be cut off from the factory, but the switch at Harwarden would remain closed, with the electric supply still able to go through it. If, however, a fault occurred between switch No. 1 and Harwarden, the switch at Harwarden would trip. On a correct setting of switches, that nearest to a fault should trip first. It was the practice at the power house at Harwarden when the switch there tripped to close it again after two or three minutes without any communication with the factory, the only consumer served by that switch. If the system were properly operating, the switch at Harwarden would only trip when there was a fault on the line between Harwarden and switch No. 1 in the employers' factory.

It occurred occasionally that a temporary fault developed on that line which, after some minutes, would rectify itself. In those circumstances there would be no danger to anybody in the factory if the electricity were again turned on at Harwarden;

but if the switches were improperly set so that the switch at Harwarden tripped first as the result of a short-circuit in the factory there would be danger if the electric supply were turned on again at the sub-station, for the effect of turning on the power again from the power house would be to cause a second explosion where the first had occurred.

A fault, having developed on the load side of No. 4 switch, caused that switch to trip. The explosion occurred on the supply side of No. 4 switch for, after No. 4 switch had tripped owing to the fault on the load side, the insulation system in or near that switch on the supply side gave way, and there was a short-circuit. That short-circuit did not trip the switches in the factory nearest to the fault. It also did not trip switch No. 1, but it did trip the switch at Harwarden sub-station.

Shortly afterwards a servant of the power company at Harwarden, the plaintiff alleged, negligently turned the current on again. The effect of that, the switches in the factory not having tripped, was to send electrical energy flowing back to the fault where there had already been an explosion, and so to cause a second explosion.

Switches Nos. 2 and 3 at the factory were not so set that they tripped, and it was found after the explosion that No. 1, the control switch, had been jammed throughout. Switches Nos. 1, 2 and 3 belonged to the power company, and were controlled by them. Switches Nos. 2 and 3, though not No. 1, could be operated by the employers, who, however, would not alter a setting except with the co-operation of the power company.

Beney K.C. and *Elsden* for the plaintiff.

Edmund Davies K.C. and *Lind Smith* for the employers.

Geoffrey Howard and *James Amphlett* for the power company (arguing on the claim against the company under the regulations of 1937). These regulations are not intended for the protection of workmen, and the plaintiff therefore has no cause of action by reason merely of their breach. Section 60 of the Factories Act, 1937, exhibits the kind of language used when the legislature intends to give a benefit to an injured workman [*Brocklehurst v. Manchester, etc., Steam Tramways Company* (1) referred to.]

The fact that the power company are "answerable for . . . " default " under para. 77 of the schedule to the Electric Lighting (Clauses) Act, 1899, does not make them answerable to an

(1) (1886) 17 Q. B. D. 118.

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individual for every breach of the regulations of 1937 on the basis of a breach of statutory duty. The paragraph refers only to common-law liability. [Tucker L.J. Ought not the word "default" in reg. 39 of the regulations of 1937 to be read in conjunction with the same word in para. 77?] That is very far from being conclusive. When undertakers have been guilty of a negligent act which exposes them to liability to someone, the effect of para. 77 is to make them statutorily answerable for that negligence. Under the regulations they are also liable to a penalty for breach of regulation, but that does not affect their liability (if any) to anyone else.

[Morton L.J. The undertaker, under para. 77, is liable for a default. If the default consists of breach of regulation, then that breach is surely a default for which the undertaker is liable under para. 77?]

[*Midwood & Co., Ltd. v. Manchester Corporation* (1) and *Goodbody v. Poplar Borough Council* (2) referred to.] It is to be observed, moreover, that there is no regulation prescribing that switches and cut-outs shall be so set that those nearest to any explosion shall give way first.

Elsden (called on to reply only on the question whether breach of the regulation gave a cause of action). Breach of one of the regulations of 1937 gives a right of action apart from any question of negligence. There are statutory enactments for the benefit of the general public and statutory enactments for the benefit of a particular class. These regulations belong to the latter class, for they must have been framed with regard to the safety of workmen. [Morton L.J. Do you say that an electric power company are answerable for every accident which happens as a result of a breach of the regulations in their area?] Yes. It can be put as high as that, for an undertaker who is in breach of one of the regulations is liable to a penalty on that account, and reg. 39 provides that liability to a penalty shall not exclude recovery of compensation by anyone injured thereby.

MORTON L.J. I will ask my brethren to deliver judgment first.

SOMERVELL L.J. To consider first of all the liability of the employers, they are subject to the Electricity Regulations, 1908, made under the Factory and Workshop Acts, 1901 to 1911.

(1) [1905] 2 K. B. 597.

(2) (1914) 79 J. P. 218.

The first relevant words are: "It shall be the duty of the "occupier to comply with these regulations." There is this very wide definition of "apparatus": it is stated to mean "electrical apparatus" and to include "all apparatus, "machines and fittings in which conductors are used, or of "which they form a part." There follows a definition of "danger." Regulation 1 seems to be the only one to be considered. It provides: "All apparatus and conductors "shall be sufficient in size and power for the work they are "called upon to do, and so constructed, installed, protected, "worked and maintained as to prevent danger so far as is "reasonably practicable." It seems quite clear that the conductor in the spot where the explosion occurred, which was presumably just on the supply side of No. 4 switch, was not maintained so as to prevent danger. Mr. Davies, for the employers, admitted that the concluding words, "so far as is "reasonably practicable," put the onus upon him, and he did not strongly submit that there was any evidence on which he could rely to discharge that onus. That seems to settle the liability of the employers, subject to their counsel's contention that the faulty condition of the insulation was not the effective cause of the explosion. He admitted that there could be two proximate causes in a case of this kind, but he submitted that the real cause was not the fact that the insulation was in such a condition that there could be an explosion, but the fact that the switch at Harwarden was not properly timed, and that, of course, he had no responsibility for that. It was timed to go off too soon, in addition to which the employee at Harwarden turned on the electricity again. Alternatively, he relied on contributory negligence.

Taking the first point, it being conceded, as, indeed, is quite clear, that there can be two proximate causes in a case of this kind, and that two separate defendants may be liable in respect of the same accident, although their negligence or breach of regulations play different parts, this seems as clear a case as could be where there are two causes in that sense. Assuming for this purpose all that Mr. Davies says against the power company (and that, of course, is part of his argument), it seems to me that the employers' breach of this regulation was a proximate cause of the accident. I think it unnecessary, in view of that, to consider the position of the employers vis-à-vis the actual timing or setting of the switches. I think that that would be a waste of time, but it is just worth noting in

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passing, that they have I think, a strong point in saying that, even if the switches at their premises were set a little low, what really controlled the matter was the switch at Harwarden. However, in relation to the employers, I should refer to the fact that switch No. 1 was jammed. Switch No. 1 was an "apparatus" and clearly at the material date it was not so maintained as to prevent danger. That also is a breach of their duty under the regulation; but I think that the first breach to which I have referred carries the liability, though, when it comes to considering contribution, it may be that the other point is relevant.

[His Lordship found the plaintiff not guilty of contributory negligence, and continued:] The liability of the power company turns on the Electricity Supply Regulations, 1937, made by the Electricity Commissioners under the Electricity Supply Acts, 1882-1936. By reg. 24, which is headed "Protection of consumers' installations against excess energy," there must be an automatic circuit breaker or some other device. Regulation 25 (a) is the important one, and provides: "The undertakers shall be responsible for all electric lines and apparatus placed by them on the premises of a consumer and either belonging to the undertakers or under their control" (whether forming the whole or part of the consumer's installation or not) being installed and maintained in a safe condition and suitable for their respective purposes and being "so fixed and protected as to prevent so far as is reasonably practicable leakage to any adjacent metal."

On the question what is the liability, whether solely a liability in negligence, Mr. Howard, for the power company, referred to certain authorities and to the Schedule to the Electric Lighting (Clauses) Act, 1899, which he accepted as applying to the power company. By para. 77, headed "Undertakers to be responsible for all damages," "the undertakers shall be answerable for all accidents, damages and injuries happening through the act or default of the undertakers, or of any person in their employment, by reason of or in consequence of any of the undertakers' works, and shall save harmless all authorities, bodies, and persons by whom any street is repairable, and all other authorities, companies and bodies collectively and individually, and their officers and servants, from all damages and costs in respect of those accidents, damages and injuries."

There is some authority—not particularly helpful on the facts of this case—on the meaning of the words “act or default,” but reg. 39 provides: “If the undertakers make default in complying with any of the preceding regulations, they shall, subject to the provisions of reg. 38 (a) and of any Act or Order relating to the undertaking, be liable on conviction to a penalty not exceeding 10*l.* for every such default and to a daily penalty not exceeding 10*l.* The recovery of a penalty under these regulations shall not affect the liability (if any) of the undertakers to make compensation in respect of any damage or injury which may have been caused by reason of the default.”

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It seems to me that in those circumstances the default, which is a breach of the regulations which may cause damage or injury under reg. 39, is a default for which undertakers are answerable under para. 77 of the schedule, and, I think, not merely the fact that the same word is used, but the whole wording of reg. 39 reinforces that view.

It is alleged against the power company, first, that No. 1 switch was not maintained in a safe condition and suitable for its respective purposes, because it would not work. It is also said that either switch No. 1 or the switch at Harwarden, or, possibly, switches Nos. 2 and 3, were not maintained in a safe condition and suitable for their respective purposes, because they were not timed so as to go off in the order which I have described. It may be that it is sufficient to refer to No. 1 switch. The evidence is certainly that if it had been properly timed, or properly timed in relation to Harwarden, or Harwarden properly timed in relation to it, the accident would not have happened. Without considering the position at common law, it seems to me that the power company are liable to the plaintiff. [His Lordship referred again to the evidence, which he found to establish that the switches at the factory were not set to trip soon enough, and continued:] For those reasons it is unnecessary to consider the common-law liability of either company, as I have come to the conclusion, for the reasons given, that the employers were liable in respect of the fault which led to the two explosions, and that the power company committed a breach of statutory duty and were liable in respect of the condition of No. 1 switch, and also, speaking for myself, in the fact that the Harwarden switch was not set to go off last of the switches in question. The appeal should be allowed.

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TUCKER L.J. [after disposing of questions raised on the pleadings and finding the plaintiff not guilty of contributory negligence :] I agree, for the reasons explained by Somervell L.J., that the employers, are clearly liable in respect of switch No. 1 and the break-down near switch No. 4. In fact, their counsel conceded that their clients were in breach with regard to those two switches under reg. 1 of the Regulations of 1908. The argument was that, although they were in breach, that was not the cause of the accident ; but for the reasons indicated I am unable to accept that argument.

I also agree that the power company are liable in respect of switch No. 1, on the ground of failure to comply with regs. 24 and 25 of the Electricity Supply Regulations, 1937. I think that on the true construction of those regulations, and having regard to reg. 39 and para. 77 of the Schedule to the Electric Lighting (Clauses) Act, 1899, and also to s. 6 of the Electric Lighting Act, 1882, it is reasonably clear that the undertakers are liable in damages for personal injury to an employee of a customer to whom they supplied current for any default on their part under the regulations. For those reasons I agree that the appeal succeeds.

Finally, reg. 25 of the regulations of 1937 refers to the possibility of an agreement between the undertakers and the consumers with regard to the maintenance of the apparatus. Here there was an agreement between the parties, dated October 24, 1942. Under cl. 13 (a) with regard to switch No. 1 the undertakers were by their contract with the consumers under the following liability : " The company shall at its own expense " maintain the service line, plant or other apparatus specified " in part II. of the schedule of this agreement," and that includes switch No. 1. That, of course, only affects the position as between the two companies, but it may have some bearing on the question of contribution between them. I agree that the appeal succeeds and that there must be a new trial to ascertain the amount of damages.

MORTON L.J. I agree that the employers are liable in respect of the breach of reg. 1 of the Electricity Regulations, 1908, in regard to both switch No. 1 and switch No. 4. Switch No. 4 was in fact the property of the employers and switch No. 1 was not, but they were liable in respect of switch No. 1 because of the opening words of the regulations in question. The first heading is " Duty," and there follow these words : " It shall be the

"duty of the occupier to comply with these regulations," and switch No. 1, as well as No. 4, was on the employers' premises.

I should have been glad to explain more fully the reasons why we are unable to agree with the reasoning of the judge, but owing to the fact that the transcript of the judgment is not satisfactory, I am unable to extract from the judgment exactly what the judge's reasons were. As regards reg. 1 of the regulations of 1908, I cannot find that the judge made any observations on the question whether the employers had so maintained switches Nos. 1 and 4 as to prevent danger. Again, we are all of opinion that the power company were guilty of a breach of reg. 25 of the Electricity Supply Regulations, 1937. In regard to that, the judge is reported as saying: "From beginning to end in this case there "has been nothing to suggest that the switch"—that is No. 1 switch—"was not entirely in accordance with No. 25 of the "regulations." I am unable to understand that observation, if it is correctly reported, for, as Tucker L.J. has pointed out, reg. 25 was expressly referred to in the particulars delivered by the plaintiff, and it seems to me that there was clearly evidence upon which the court could find, and upon which this court has found, that the power company failed to observe that regulation.

I agree that the appeal must be allowed and that there must be a further trial to ascertain the amount of damages, unless they are agreed.

We think that, while the judgment will be for the full amount against each of the companies, as between themselves the judgment should be borne as to two-thirds by the power company and as to one-third by the employers.

Appeal allowed.

Solicitors for the plaintiff: *Rowley, Ashworth & Co.*

Solicitors for the employers: *P. F. Walker, for Weightman, Pedder & Co., Liverpool.*

Solicitors for the power company: *William Charles Crocker.*

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In re CITY OF PLYMOUTH (CITY CENTRE)

DECLARATORY ORDER, 1946.

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Apr. 21, 22,

23, 24 ;

May 12.

ROBINSON *v.* MINISTER OF TOWN AND COUNTRY
PLANNING.

Lord Greene

M.R.,

Somervell and

Wrottesley L.JJ.

Emergency legislation—War damage—Local government—Extensive war damage in area of local planning authority—Need to lay out afresh—Declaratory order—Town and Country Planning Act, 1944 (7 & 8 Geo. 6, c. 47), s. 1.

Owing to extensive war damage in an area of Plymouth the city council applied for an order under the Town and Country Planning Act, 1944, declaring that land in that area should be subject to compulsory purchase. The applicants, as the owners of several houses and the sites of three houses, all in a crescent on the edge of the area, objected to the inclusion of these properties in the order on the ground that as the council proposed to retain the existing fronts of the houses and to rebuild the three houses destroyed by enemy action, the Minister could not be "satisfied that this part of the area should be laid out afresh and "redeveloped as a whole" as required by s. 1, sub-s. 1. The Minister directed that there should be a public inquiry, and after receiving his inspector's report, he made the order asked for. The applicants moved to have the order quashed so far as concerned their property:—

Held (reversing the decision of Henn-Collins J.) that the declaratory order had been properly made under s. 1 of the Act, seeing that (1.) By making the order the Minister does not approve or confirm the proposals of the local planning authority which can be changed: (2.) In satisfying himself that the area comprised in the order should be "laid out afresh and redeveloped as a whole," the Minister need not act only on the evidence at the public inquiry, but may have regard to his own views as to general policy or the material acquired in a purely executive capacity; (3.) The Minister is under no obligation to reveal the information, other than the evidence at the public inquiry, on which he is acting, for it is not for the court to decide whether the Minister had sufficient material to justify his satisfaction; (4.) The Minister has only to be satisfied that the area as a whole ought to be laid out afresh and redeveloped and not that this is true of every separate property in the area.

APPEAL from Henn-Collins J.

The facts, which are fully stated in the judgment of Lord Greene M.R., were briefly as follows:—

On February 8, 1946, the Plymouth City Council applied by their town clerk to the Minister of Town and Country

Planning for an order under the Town and Country Planning Act, 1944, declaring land in Plymouth known as Reconstruction Area No. 1 (City Centre), containing about a hundred and seventy-eight acres to be subject to compulsory purchase for the purpose of dealing satisfactorily with extensive war damage. At the edge of the area was a road called The Crescent of which the eighteen houses (apart from six houses destroyed by enemy action) were mainly occupied by doctors. By seven letters and enclosures, dated March 20 and 23, 1946, the owners of Nos. 4, 8, 9, 10, 11 and 12 and the sites of Nos. 14, 15 and 16 (hereinafter called the applicants) objected to the inclusion in the order of these properties. On the receipt of these and other objections the Minister directed an inspector of the Ministry to hold a public local inquiry at which the applicants and the City Council might appear and be heard. The inquiry was held on April 29 and 30 and May 12, 1946, and, after hearing the evidence and inspecting the land asked to be included in the order, the inspector made a written report to the Minister, dated May 27, 1946. He there summarized the submissions and evidence and enclosed a shorthand note of the proceedings. On November 6, 1946, the Minister made the declaratory order asked for, after being satisfied that the premises of the applicants in the Crescent had sustained war damage or were contiguous or adjacent to land which had suffered war damage, and that it was requisite for the purpose of dealing satisfactorily with extensive war damage that the land included in the order should be laid out afresh and re-developed as a whole.

On December 5, 1946, the applicants gave notice of motion asking that the declaratory order should be quashed so far as it affected their freehold properties in the Crescent. The grounds of the application were that the declaratory order in so far as it affected their properties was not within the powers of the Town and Planning Act, 1944, and that the requirements of the Act had not been complied with in that there was no evidence upon which the Minister could be satisfied (1.) that any of the applicants' properties were within an area of extensive war damage, and (2.) that it was requisite for the purpose of dealing satisfactorily with war damage in the area embraced in the declaratory order that any of the applicants' properties should be laid out afresh and redeveloped.

Henn-Collins J. made an order quashing the Minister's declaratory order in so far as it related to the applicants' properties.

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C. A. The Minister appealed.

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Sir Hartley Shawcross A.-G. and *H. L. Parker* for the Minister.

Scott Henderson K.C. and *J. T. Molony* for the applicants. During the course of the arguments the following cases were referred to: *In re Ripon (Highfield) Housing Confirmation Order, 1938* (1); *Liversidge v. Anderson* (2); *Point of Ayr Collieries, Ltd. v. Lloyd-George* (3); *Local Government Board v. Arlidge* (4); *Miller v. Minister of Health* (5); *Errington v. Minister of Health* (6); *Price v. Minister of Health* (7); *Minister of Health v. R.* (8); *In re Bowman* (9).

Cur. adv. vult.

May 12. The following judgments were read.

LORD GREENE M.R. This is an appeal by the Minister of Town and Country Planning from an order of Henn-Collins J. by which he ordered that the "City of Plymouth (City Centre) "Declaratory Order, 1946," being an order of the Minister made on the application of the City Council of Plymouth as the local planning authority under sub-s. 1 of s. 1 of the Town and Country Planning Act, 1944, (which I will call "the Act"), should be quashed in so far as it affected the freehold properties of the applicants situated in The Crescent in the City of Plymouth. Before the aerial bombardments of the city which took place during the late war The Crescent consisted of a row of eighteen houses numbered consecutively from east to west which were approached by a private road running from Athenæum Street to George Street. Beyond this private road there lay a private garden which was held by trustees for the benefit of the owners of the houses in The Crescent. The houses were, from the point of view of construction, residential in character although at all relevant times they were to a large extent used for professional purposes, mostly by members of the medical profession, or as flats and private hotels as well as for private residential purposes. Of these houses, six,

(1) [1939] 2 K. B. 838.

(2) [1942] A. C. 206.

(3) [1943] 2 All E. R. 546.

(4) [1915] A. C. 120.

(5) [1946] K. B. 626.

(6) [1935] 1 K. B. 249.

(7) [1947] 1 All E. R. 47.

(8) [1931] A. C. 494.

(9) [1932] 2 K. B. 621.

namely, Nos. 13 to 18 inclusive, were destroyed and one, No. 12, was badly damaged by enemy action. The nine houses or sites of houses owned by the several applicants are numbered 4, 8 to 12 inclusive and 14 to 16 inclusive. The applicants, therefore, between them own five undamaged houses, one damaged house and the sites of three destroyed houses. The effect of the order of the Minister, of which the applicants complain, is to make all these nine houses or sites of houses, as part of a very large area in the centre of the city, subject to compulsory purchase.

The provisions of the Act which are relevant to this appeal are of a very special character designed as they were to meet an unprecedented situation. At the time when the Act was passed many cities and towns in this country had suffered extensive damage over considerable areas from enemy action. It was obviously impossible or at any rate most undesirable to leave the rebuilding of these areas to the owners of the properties concerned, since the result of doing so would have been to destroy any possibility of proper and orderly replanning. The existing town planning legislation was clearly inadequate to cope with this state of affairs. The legislature evidently thought (for the Act so provides) that the task of reconstruction on such an extensive scale should be committed to suitable local planning authorities and that they should be armed with compulsory powers of purchase as being the only satisfactory method of dealing with the situation. There was another circumstance which the legislature obviously had to bear in mind. When the Act was passed, the war was not over. The task of formulating and settling a comprehensive scheme for the lay-out of considerable areas might be expected to take a long time and a long time would be bound to elapse before work could be put in hand. Something clearly had to be done in the meantime in order to ensure that when the time came to put a scheme into operation the planning authority should not find that owners of property in the area had taken steps in relation to their property which might make it difficult or impossible to carry out. The situation demanded something in the shape of what my perhaps be called a standstill order which could be made comparatively quickly and would effectively preserve, so to speak, the status quo. The particular machinery provided for this purpose by the Act is the power given to the Minister under s. 1, sub-s. 1, to make an order declaring an area to be subject to compulsory purchase.

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Such an order must under s. 17 be registered as a local land charge, and the effect of it is, of course, that no owner can deal with his land in the area save subject to the rights of compulsory purchase conferred on the local planning authority. This is the position in which the present applicants were placed by the order of which they complain and their object in these proceedings is to remove from their property the threat of compulsory acquisition by the City Council of Plymouth. The Act provides for a variety of other matters with which it is unnecessary to deal. The provision most immediately relevant to the present controversy is contained in s. 1, sub-s. 1, and is as follows :
 " Where the Minister of Town and Country Planning (in this Act referred to as ' the Minister ') is satisfied that it is
 " requisite, for the purpose of dealing satisfactorily with exten-
 " sive war damage in the area of a local planning authority,
 " that a part or parts of their area, consisting of land shown to
 " his satisfaction to have sustained war damage or of such land
 " together with other land contiguous or adjacent thereto,
 " should be laid out afresh and redeveloped as a whole, an
 " order declaring all or any of the land in such a part of their
 " area to be land subject to compulsory purchase for dealing
 " with war damage may be made by the Minister if an appli-
 " cation in that behalf is made to him by the authority before
 " the expiration of five years from such date as the Minister
 " may by order appoint as being the date when the making of
 " such applications has become practicable. A part of the area
 " of a local planning authority as to which the Minister is
 " satisfied as aforesaid is in this Act referred to as an ' area of
 " extensive war damage ' ."

The procedural provisions in connexion with the obtaining of an order under the sub-section may so far as relevant be summarized as follows : (a) Under sub-s. 4, at least two months before the application is made the authority must publish a notice in a local newspaper ; (b) under sub-s. 5, the application must " designate " the land to which the application relates by reference to a map with or without descriptive matter ; (c) under sub-s. 6, the application must be accompanied by a statement illustrated by a map " for indicating the manner " in which it is intended that the land in the area of extensive " war damage . . . should be laid out as respects its internal " arrangement and in relation to the existing or intended lay- " out of the surrounding locality, and the manner in which it is " intended that such land should be used whether for purposes

" requiring the carrying out of development or otherwise " ; (d) under sub-s. 7, if the Minister is satisfied that these particular are adequate for enabling the " expediency of the making of an " order " to be properly considered, he notifies the authority who must then advertise for objections ; (e) under the first schedule unless the Minister, apart from an objection (which must be accompanied by a written statement of its grounds), decides to refuse the application or to make an agreed modification to meet the objection he must (para. 2) " consider the " grounds of the objection as set out in the statement " and may call for a further statement. Under para. 4 the Minister, " if satisfied that he is sufficiently informed, for the purpose " of his deciding as aforesaid " (that is, whether or not to make the order applied for) " as to the matters to which the " objection relates " he may decide to make the order without further investigation. Subject to this the Minister (para. 5) must give the objector an opportunity of appearing before a person nominated by the Minister and, if the objector avails himself of this, a similar opportunity to the authority. Under para. 6 if it appears to the Minister that the matters to which the objection relates call for investigation by a public inquiry he must cause such an inquiry to be held in which case the requirements of para. 5 as to a private hearing need not be complied with ; (f) under sub-s. 8, subject to the provisions of the first schedule the Minister may make the order with or without modification, except that he cannot extend the area unless all persons interested consent.

These requirements as to procedure were duly carried out in the following manner. The application was dated February 8, 1946. There was annexed to it a map called a " designation " map (that is, the map required by sub-s. 5 of s. 1 of the Act to " designate the land to which the application relates ") on which the area comprised in the application, namely, a hundred and seventy-eight acres in the centre of the city, was shown edged and coloured red. For reasons which will be explained when I come to consider the language of sub-s. 1, this map was the only map which was referred to in the order now under challenge. Pursuant to sub-s. 6, the application was accompanied by a statement illustrated by four maps, of which two only are before us, namely, A2 which shows among other things the then existing condition of the area as regards destruction or damage ; and A3 which shows the various purposes for which the buildings, etc., within the area were used

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before the damage occurred : and a lay-out plan. The statement and the lay-out plan show comprehensive proposals for laying out the area in a novel maner as the shopping, business and civic area of the city with various new streets and open spaces. The plan purports to show standing undamaged buildings by unbroken hatching, damaged buildings broken hatching and destroyed buildings by unhatched spaces. The copy of the plan with our papers is not, however, very clear and the position in these respects is seen better on the map A2 above mentioned. The plan shows a substantial number of existing buildings on which no work was proposed, including the houses Nos. 2-12, inclusive, The Crescent. It also shows a proposed new road of a width (including foot-paths) of between fifty and sixty feet running roughly along the line of the existing private road and taking in part of the private garden and also part of the site of No. 1, The Crescent. Between the houses and the proposed foot-path a crescent-shaped space varying in depth from nil at the two ends to some twenty feet in the middle is shown. I should mention that the houses and sites of destroyed houses in The Crescent with their curtilages and what appear to be garages are situate at the extreme south-west corner of the area. The applicants and other owners of land within the area sent in their objections and the Minister caused a local public inquiry to be held by Mr. Warren, an inspector of the Ministry, whose report was duly made to the Minister. In his affidavit the Minister states that before deciding to make the order he personally considered the objections and the report with a transcript of the shorthand notes of the proceedings at the inquiry. Paragraph 7 of his affidavit is as follows : " Before deciding to make the said " order I personally carefully considered the objections of the " applicants and the said report of the said Henry George " Warren and the said transcript. I was satisfied that the " premises known as Nos. 4, 8, 9, 10, 11, 12, 14, 15 and 16, " The Crescent, Plymouth, had sustained war damage or were " contiguous or adjacent to land which had suffered war damage " and that it was requisite for the purpose of dealing satis- " factorily with extensive war damage that the land included " in the order should be laid out afresh and redeveloped " as a whole." The order, which is dated November 6, 1946, recites that the Minister was satisfied that an order should be made in respect of the land shown edged and coloured red on the " designation map " and ordered that the said land should be

subject to compulsory purchase by the City Council for the purposes of s. 1 of the Act.

I need not set out the objections originally raised by the applicants since it will be sufficient to state their argument before this court. Their application to quash the order so far as it affected these houses and sites was made under s. 16 of the Act on the ground that the order was not within the powers of the Act and was invalid accordingly. Before I state the grounds on which the applicants attack the validity of the order I must refer to certain statements in the evidence given at the public inquiry upon which their whole case really rests.

Mr. James Paton Watson, the city engineer, who was called on behalf of the City Council, explained in his evidence-in-chief the defects of the pre-war lay-out of the city and the general principles on which the proposed lay-out shown in the lay-out plan had been designed. The statement submitted with the application indicated, he said, the use to which the area would be put. In cross-examination by counsel for the applicants he made the statements with regard to the council's proposals in relation to The Crescent upon which the applicants rely. They are set out in paras. 8-11 of the affidavit of James Foulds Knape and Alec Edward Sanders, sworn on the motion, and may be concisely summarized as follows: The council liked the facades of the surviving buildings and proposed to leave them intact, and with regard to the destroyed buildings the intention was to reinstate as far as possible. But with regard to interiors it might be that The Crescent would be reconstructed behind the existing facade since the houses would not remain as dwelling-houses but would be likely to develop into professional offices, hotels and boarding houses. It was very common practice to take the building depth adjacent to a road frontage. The land was being laid out afresh by bringing the road round the front. The proposal was to offer leases to the existing owners at rents based on the price to be paid by the council to acquire their property. I will now explain as best I can the reasons put forward on behalf of the applicants for saying that the order was invalid. Under sub-s. 1, of s. 1, of the Act, it was said that the Minister's power to make an order only arises when he is "satisfied" that for the purpose stated it is "requisite" that the area comprised in the order "should be laid out afresh and redeveloped as a whole": the purpose stated is that of "dealing satisfactorily with extensive "war damage"; and the area comprised in the order must

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consist of land as to which the Minister is satisfied that it has sustained war damage, either without or together with land contiguous or adjacent thereto. On this last-mentioned matter no question arises since the right of the Minister to be so satisfied is not challenged, the applicants' land consisting as it does of land which has suffered war damage together with land contiguous or adjacent thereto. But with regard to the other requirements specified in the sub-section it is said that the Minister can only be "satisfied" if at the time of the order he has before him evidence sufficient in law to entitle him to be so "satisfied." Here it is said that there was no such evidence before the Minister, rather the only evidence brought to his mind so far as the court is informed, that is to say, the evidence given at the inquiry, is all the other way since, with regard to the surviving houses, they are to remain while with regard to the destroyed houses they are to be rebuilt; that, in neither case was the Minister entitled to be satisfied, since to leave standing houses as they are and to rebuild destroyed houses do not involve a "lay-out afresh" or a "redevelopment," even if the intention is to change their user: and that, accordingly, the Minister was not entitled to take the view that The Crescent should be included in the area since he cannot in law have been satisfied that it was requisite to lay it out afresh or redevelop it.

These contentions are, in my opinion, based on certain fundamental misconceptions as to the purpose and effect of an order made under sub-s. 1 of s. 1, as to the powers of the Minister with regard to the making of an order and as to the relevance of the proposals of the planning authority with regard to fresh lay-out and redevelopment as revealed in the statement and map which accompany the application or in the evidence given on their behalf at a public inquiry if the Minister decides to order one. The first thing to notice is that the order of the Minister under sub-s. 1, is in no respect an order approving or confirming any proposals of the local planning authority as to fresh lay-out or redevelopment. The approval or confirmation of such proposals is not in any sense the issue submitted to him. Whether he approves or disapproves of any such proposals in whole or in part, he may still make an order, since the only thing of which the sub-section requires him to be satisfied is the requisiteness of laying out afresh and redeveloping as a whole an area of war damaged land (with or without contiguous or adjacent land) for the purpose of dealing

satisfactorily with extensive war damage. He may well be satisfied as to this whatever the planning authority may propose as being its actual plans at the time of the application. Under the Act the Minister has effective control of the form which the lay-out and redevelopment ultimately is to take since at a later stage he can, for example, refuse to give authority for compulsory purchase (as to which, see s. 31), and can withhold money grants under s. 5. But at this stage all he is concerned with is the making of what I have roughly described as a standstill order declaring the land to be subject to compulsory purchase. It is true that by sub-s. 6, of s. 1, the planning authority must indicate the manner in which it intends to lay out the land and the manner in which it is intended that it shall be used; but this indication is not for the purpose of obtaining the approval of those intentions, it can only be for assisting the Minister in coming to the conclusion which sub-s. 1 requires him to come to before making an order, namely, the requisiteness of laying out afresh and redeveloping the land for the purpose of dealing satisfactorily with extensive war damage, or, to quote the language of sub-s. 7, "for enabling" "the expediency of the making of an order to be properly" "considered." The fact that a practical proposal is put before him will clearly help him in his deliberations, even though it may not be the proposal finally adopted. In the present case the "designation map" referred to in the order illustrates exactly what the order does and what it does not do, since it consists of a map of the relevant portion of the city as it existed before the war with the area subjected to compulsory purchase marked in red and has no indication whatever of any proposed fresh lay-out or redevelopment. If the order had purported to sanction any such lay-out or redevelopment it would clearly have been ultra vires the sub-section. The extraordinary result to which the argument would lead can be seen from the fact that it was admitted that the intentions of the council as to lay-out and redevelopment can always be changed. The result of this admittedly would have been that had they indicated an intention to pull down the surviving houses and build, for example, municipal offices on the site of The Crescent—an unquestionable fresh lay-out and redevelopment—they could the day after obtaining an order have changed their minds and decided to do what they now are proposing to do, in which case the validity of the order could not have been impugned.

There is another matter worth pointing out. An area may

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apparently be constituted an " area of extensive war damage " —that is, an area as to which the Minister is satisfied that it is requisite that it should be laid out afresh and redeveloped as a whole for the purpose of dealing satisfactorily with extensive war damage—quite independently of the making of the application for an order under sub-s. 1. This appears from, for example, sub-ss. 2 and 3 of s. 2. Such an area is so constituted by the mere fact of the Minister being satisfied as to the matters specified. As in such a case no procedure is laid down in respect to the process of bringing about the state of satisfaction it is manifest that it may be brought about by, for example, inquiries made on behalf of and advice given to the Minister from within or without his department. What, according to the argument for the applicants, is to be the position where the Minister has so satisfied himself and an order under sub-s. 1 is subsequently applied for and a public inquiry is directed? Is he to put out of his mind altogether the conclusion that he has already formed and start *de novo*? That is the answer given by Mr. Scott Henderson, but in my opinion it stands self-condemned. Such a requirement would be completely unpractical and might result in the position that an area might be an area of " extensive war damage " for the purposes of sub-ss. 2 and 3 of s. 2, but could not become such an area for the purposes of sub-s. 1 of s. 1. I do not mean that it is not competent to the Minister to change his mind as the result of matters ascertained in the course of dealing with the application and objections thereto. Theoretically he could, no doubt, do so although it is for obvious reasons highly improbable that he would, since it is not to be expected that he would lightly have allowed himself to be satisfied in respect of an area, when in his position as Minister he must clearly have been able to procure for himself all relevant material and command all necessary expert advice. But the point is not whether theoretically he might change his mind, but whether he would be bound to do so or rather whether the court would be bound as a matter of law, as the applicants say, to treat him as not having been satisfied for the purposes of sub-s. 1 unless he was prepared to disclose to the court his reasons for being satisfied; with the consequence that the court would be left to judge whether in those reasons was to be found sufficient evidence to support the order.

I will now turn to the matters with regard to which the Minister must be satisfied before he makes the order. They

fall into two classes. First, it must be shown to his satisfaction that a particular state of facts exists, namely, that a part (or parts) of the area of the local planning authority consists of land which has sustained war damage or of such land together with other land contiguous or adjacent thereto. As I have said, no question is raised as to the propriety of the Minister's conclusion upon this point, and I need say nothing more about it. The other class of matter is, in my view, one of opinion and policy as to which the Minister, assuming always that he acts bona fide, is the sole judge; namely, he must be satisfied that it is requisite for the purpose of dealing satisfactorily with extensive war damage that all or some part of the land in question should be laid out afresh and redeveloped as a whole. The words "requisite" and "satisfactorily" clearly indicate that the question is one of opinion and policy, matters which are peculiarly for the Minister himself to decide. No objective test is possible. If confirmation of this view is sought, it is to be found, for example, in the provisions of the first schedule under which the Minister, although bound to consider objections, is entitled to make his decision without any private hearing or public inquiry. In making his decision he may obviously be guided by his own views as to what is "expedient" for the purpose of dealing "satisfactorily" with extensive war damage, assisted, of course, by any advice which he may obtain from his own staff or from outside advisers. But the decision and the principles and policy which lead him to it are such as commend themselves to him. This cannot be affected by the fact that he decides to order a public inquiry. The object of such an inquiry under the first schedule can only be to elucidate matters upon which he desires to be better informed. Nothing that is said or done at it can bind his discretion although it may have some bearing on the question of bona fides. In exercising his discretion he cannot be confined to the evidence given at the inquiry. Such matters form only part of the considerations which he is entitled to take into account. He may have, and is entitled to have, present to his mind his own views as to general policy as well as material acquired in a purely executive capacity, such as reports and opinions obtained from sources within or outside the Ministry. In the end, Mr. Scott Henderson, on behalf of the applicants, was constrained to admit the right of the Minister to be guided by matters brought to his mind in his executive capacity, even if they are different from and inconsistent with evidence

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given at the public inquiry. But he put his argument in this way. The matter as to the requisiteness of which, for the purpose indicated, the Minister is to be satisfied is the necessity of laying out the land afresh and redeveloping it as a whole. On the face of the lay-out plan itself, coupled with the evidence given on behalf of the City Council at the inquiry, it appears (so the argument runs) that there is no intention of laying out or redeveloping the Crescent; that so far as the court is informed the Minister had no other materials before him and on these materials alone it was impossible in law for him to be satisfied as to the stipulated requisiteness. Then it was said that, admitting his right to take into consideration other materials obtained dehors the inquiry, he was only entitled to be guided by them if he had communicated them to the objectors so as to give them an opportunity of dealing with them. If his obligation did not go so far as this, then it was said that when his order was challenged the court was bound to assume that he had no other materials unless he condescended to give evidence to the effect that he did have them, and as to what they were. In the result, as no such evidence was given in the present case, the court had no option save to hold the order to be invalid as not having the necessary foundation to give it validity in point of law.

There are, as it appears to me, a variety of grounds on which this argument should be rejected. It imports an objective test into a matter to which such a test is entirely inappropriate since it leaves it to the court to decide what matters are and what are not sufficient to justify a conclusion as to requisiteness; this is necessarily so since the question which, according to the argument, the court has to propound to itself will be, was the evidence before the Minister such as to entitle him to be satisfied on the point of requisiteness; and this is to substitute a test formulated, in some unexplained manner and according to some unascertainable principle, by the court itself for the opinion of the Minister to which the language of the sub-section commits the decision. Again, the argument is based on the misconception to which I have already referred as to the part to be played by the proposed lay-out which, at the time of the inquiry, is in the mind of the planning authority. Evidence given as to that has, for reasons already explained which I need not repeat, a purely collateral bearing on the matter as to which the Minister has to decide. Further, the suggestion that in such a case as the present the Minister is bound to fail before the

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court unless he leads evidence as to the materials which he has before him over and above those used or given in evidence at the inquiry is, in my opinion, quite inadmissible. Let it be granted that the inquiry, if and when ordered, must be conducted on proper principles as being what is loosely called a "quasi-judicial" proceeding—an expression well adapted to mislead unless the context in which it is used is kept closely and accurately in mind—but the fact that an inquiry has been held and certain evidence given at it cannot in my judgment be used for the purpose of forcing the Minister, directly or indirectly, to reveal matters of fact or opinion which come to his knowledge in his administrative capacity. The quasi-judicial capacity in which he is loosely said to stand in relation to the inquiry is non-existent as regards matters not connected with the inquiry; such matters concern and concern only his administrative capacity and the use that he makes of them in coming to his decision is a matter for him and him alone. I am speaking, of course, of the meaning and effect of this particular statute. But the proposition is in general true that a Minister cannot be compelled to disclose to the court material which has come to him in his executive capacity. If this were not so, consequences most detrimental to the public interest would ensue, as was pointed out by Lord Shaw in *Local Government Board v. Arlidge* (1). The argument in the present case is, in effect, that unless the Minister satisfies the court that he had sufficient material dehors the inquiry to justify his satisfaction, he must inevitably fail, which amounts to saying that he must choose between disclosing at least the general nature of what it might be most detrimental to the public interest to disclose and losing his case. I have dealt on this branch of the argument with what is the point of importance. But it must not be taken from this that I accept the initial proposition that the lay-out plan coupled with the evidence given at the inquiry did, in truth, negative any present intention on the part of the City Council to lay out afresh and redevelop The Crescent. On this matter I need only mention the following considerations. The sub-section deals with the laying out afresh and redevelopment of the area as a whole. These words could not, in my opinion, mean that an existing building which it is not intended to touch would have to be excluded. As the Attorney-General put it in reply, it is not the redevelopment of the whole area but the redevelopment of the

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area as a whole which is contemplated. An existing building may well be worked into a fresh lay-out of the area as a whole. Indeed, there are provisions in the Act which contemplate that an undamaged building may be included in an area subjected to an order under sub-s. 1—see, for example, the opening words of the proviso to s. 2., sub-s. 4, which refers to land comprised in an order which “has not sustained war damage.” Again, I cannot accept the proposition submitted by Mr. Scott Henderson that a change of user provided for under a scheme cannot amount to a fresh lay-out or redevelopment. The concluding words of sub-s. 6 of s. 1, appear to show that it can. Again, the evidence given on behalf of the council at the inquiry appears to show the proposal to be to keep only the facade of The Crescent. Lastly, I must not be taken to assent to the proposition that the reconstruction of a destroyed building in its original form cannot form part of a fresh lay-out and redevelopment as a whole of an area of extensive war damage. I will not take up time in a more detailed discussion of these matters.

A number of authorities were referred to in which the powers and duties of ministers under statutes dealing in different language with different classes of subject-matter were discussed and observations were made as to their powers and duties when acting in a quasi-judicial capacity. I am basing this judgment on the particular provisions of this statute in their application to this particular subject matter; and I do not find anything in the decisions cited which either assists or impedes me to such an extent as to make it necessary for me to examine them. As an example of the difference to be found in the subject-matter dealt with in different statutes, I may point out that this case is different from a case where a minister is given the duty of hearing an appeal from an order such as a closing order made by a local authority. This is not the case of an appeal. It is the case of an original order to be made by the Minister as an executive authority who is at liberty to base his opinion on whatever material he thinks fit, whether obtained in the ordinary course of his executive functions or derived from what is brought out at a public inquiry if there is one. To say that in coming to his decision he is in any sense acting in a quasi-judicial capacity is to misunderstand the nature of the process altogether. I am not concerned to dispute that the inquiry itself must be conducted on what may be described as quasi-judicial principles. But this is quite a different thing from

saying that any such principles are applicable to the doing of the executive act itself, that is, the making of the order. The inquiry is only a step in the process which leads to that result and there is, in my opinion, no justification for saying that the executive decision to make the order can be controlled by the courts by reference to the evidence or lack of evidence at the inquiry which is here relied on. Such a theory treats the executive act as though it were a judicial decision (or if the phrase is preferred, a quasi-judicial decision) which it most emphatically is not. How can this Minister, who is entrusted by Parliament with the power to make or not to make an executive order according to his judgment and acts bona fide (as he must be assumed to do in the absence of evidence to the contrary), be called upon to justify his decision by proving that he had before him materials sufficient to support it? Such justification, if it is to be called for, must be called for by Parliament and not by the courts and I can see no ground in the language of the Act, in principle, or in authority for thinking otherwise. As I have already indicated earlier in this judgment the argument on behalf of the applicants necessarily involves in the last resort substituting the opinion of the court for that of the Minister. Different considerations, of course, apply in a case where a Minister can be shown to have overstepped the limits of his statutory powers, as, for example, where the conditions in which they may be exercised are laid down in the statute and he purports to act in a case where those conditions do not exist. The applicants' attempt to bring the present case into that category fails, as I have said, on the true construction of the statutory powers conferred. *Henn-Collins J.*, delivered a very short judgment since, in his opinion, the principle which he had considered to be applicable in the case of another objector, the Phoenix Assurance Co., also applied to the present case. My reasons for differing from the view taken by the learned judge will, as I think, be sufficiently clear from what I have already said and I hope that I shall not appear disrespectful if I do not subject it to any further examination. The appeal is allowed with costs here and below.

SOMERVELL L.J. On February 8, 1946, the Council of the City of Plymouth being the local planning authority (hereinafter referred to as the authority) applied to the Minister of Town and Country Planning for a declaratory order under s. 1, sub-s. 1, of the Town and Country Planning Act, 1944 ;

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in respect of an area in the centre of the city which had suffered extensive war damage. The application was in accordance with s. 1, sub-s. 6, accompanied by a map "indicating the manner in which it is intended that the land "in the area" should be laid out. It has also to be accompanied by a map under s. 1, sub-s. 5, "designating" the area to be covered. The Minister under s. 1, sub-s. 1 can, on application by a local planning authority, make an order covering an area shown to his satisfaction to consist of land which has sustained war damage together with other land contiguous or adjacent thereto, if he is satisfied that it is requisite for the purpose of dealing with extensive war damage in the area that it should be laid out afresh and redeveloped as a whole. The effect of the order is to declare all or any of the land in the area to be land subject to compulsory purchase. If the Minister is satisfied that the particulars submitted are adequate for enabling the expediency of the making of the order to be properly considered there are provisions under s. 1, sub-s. 7, for publication and notices. Objections can then be submitted and the first schedule provides for various procedures which the Minister can adopt when objections are made. It is not necessary to refer to all of them. Under para. 4 if he is satisfied that he already has sufficient information as to the matter to which the objection relates for the purpose of deciding whether to make the order with or without modifications, he can so decide without further investigation. Under para. 5 he can afford the objector an opportunity of being heard by a person appointed by him, the authority making the application being given the opportunity of being heard on the same occasion. Under para. 6 if it appears to the Minister that the matters to which the objection relates are such as to require investigation by public local inquiry "he shall cause such an inquiry to be held." These provisions are on the basis that the Minister may have information, irrespective of any inquiry, which he may regard as sufficient for dealing with the objection. It is only if, in his opinion, that information is or may be insufficient that he causes a public local inquiry to be held. It is a means by which he can, if he thinks fit, obtain further information before coming to his decision. In the present case there were a number of objectors including the applicants in the present proceedings. The Minister decided to have a public local inquiry which was held at the end of April and beginning of May, 1946. On

May 27 Mr. Warren who held the inquiry reported to the Minister. On November 6, 1946, the Minister made the order covering the area as originally submitted by the authority. On December 5, 1946, the present applicants applied to the High Court for an order "that the declaratory order be quashed so far as it affects the freehold property of the applicants." The applicants are the owners of nine houses in a block known as The Crescent. Three of their properties were destroyed by war damage, one other was damaged, the other five were undamaged. The notice states that the order is not within the provisions of the Act and that the requirements of the Act have not been complied with in that there was no evidence before the Minister upon which he could have been satisfied, (c) that any of the applicants' said properties were within an area of extensive war damage within the meaning of the Act, (d) that it was requisite for the purpose of dealing satisfactorily with war damage in the area embraced by the said declaratory order or any part thereof or alternatively in the City of Plymouth that any of the applicants' said properties should be laid out afresh and redeveloped, and (e) that it was requisite for the purpose mentioned in (d) that any of the applicants' said properties should be laid out afresh and redeveloped in conjunction with adjoining lands. Mr. Scott Henderson did not rely on (a) and (b). The other paragraphs of the notice alleged affirmatively that the evidence established that the purpose of the authority was not to lay out the applicants' property afresh but to obtain the benefit of increased land values; that the applicants' property could be excluded without detriment to the laying out afresh and redevelopment; and that the only decision in law open to the Minister was to exclude the applicants' property.

The relevant facts as to The Crescent are as follows: At present it abuts on a private road on the further side of which is a garden vested in trustees for the use of the owners of the houses in The Crescent. The various premises were, prior to the war, used partly as consulting rooms for doctors, partly for residential purposes, one wholly as offices and one as a private hotel. Under the authority's intended lay-out the private road and garden disappear, The Crescent which is on the boundary of the area will abut on a main thoroughfare, on the other side of which will be a public open space. The intention of the authority, as appearing in the map and in the evidence given at the public inquiry, was to reconstruct the

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demolished houses with the old facade and probably in other respects as before. No. 1 (not owned by any of the applicants) was to be demolished as the proposed new road was to occupy part of the land on which it stood. The undamaged houses were to remain as at present. To return to the parts of the notice of motion which I have quoted, the form is one with which the courts are familiar in, for example, appeals from decisions of the Special or General Commissioners on a case stated under the Income Tax Acts or on an appeal to this court from a decision of a county court judge.

It would need to my mind clear words in order to entitle an aggrieved person to raise such issues before the court in challenging what is, in my opinion, under the words of the section, a purely administrative decision by the Minister. The words relied on are the words in s. 16 which provide that the validity can be challenged on the ground that it is not within the powers of the Act. I think the Act gives the Minister the power to come to his decision as an administrative decision, which no doubt he can be called upon to justify in Parliament, but which he cannot be called on to justify in a court of law on the ground that there was either insufficient or no evidence on which a reasonable man in the position of the Minister could so decide. Before considering the authorities I will refer to other provisions of the Act which seem to me to support that view. The applicants in submitting that there was no evidence, base their case on the documents and map submitted by the authority and the evidence given at the public inquiry. The Minister is not, as it seems to me, confined to this evidence. I have already referred to the provisions of the first schedule. It is also clear that the fresh lay-out as submitted has no finality about it. The authority can alter it and it in no way binds the Minister who has effective powers of control under s. 2 when an actual compulsory purchase order is asked for and under ss. 19 and 20. The Minister is not confirming an order made by an authority. He has to decide himself under the duties imposed on him by s. 1 of the Minister of Town and Country Planning Act, 1943. It is as it seems to me, open to the Minister at this stage to take the view that the whole area should be included although he may not regard the authority's plan for lay-out as final or necessarily adequate. He might think that The Crescent in this case adjoining, as it now will, a main thoroughfare should not be left as it is. It is therefore, I think, impossible for the applicants to establish that there is

no evidence, unless the Minister can be compelled to produce his files, the report made to him and disclose what was in his own mind. This, in my opinion, would be contrary to the provisions of the Act and to authority. The Attorney-General referred to and relied on *Liversidge v. Anderson* (1) and *Point of Ayr Collieries, Ltd. v. Lloyd-George* (2). Lord Atkin in his dissenting opinion in *Liversidge's* case (1) cites the expressions "is satisfied" or "satisfied that "it is necessary or expedient" from Defence Regulations, other than that being considered, as expressions which made it "plain that unlimited discretion is given to the Secretary of State, assuming as everyone does that he acts in good faith." If reg. 18B which was under consideration had contained these words it is clear that Lord Atkin would have agreed with the majority and it is equally clear that the arguments on behalf of the appellant in that case were based on the fact that the regulation did not contain these words or words of similar import, but the words "if the Secretary of State has reasonable cause to believe," words which, as Lord Maugham said, "in the absence of a context should prima facie be construed "as meaning 'if there is in fact reasonable cause for believing'." He and the other noble and learned Lords took the view that the words were capable of giving the Secretary of State an unlimited discretion and in their context did so. The other case referred to shows that the words "if it appears to the "competent authority" give an unlimited discretion although dealing with matters in which the safety of the State was not, at any rate, so directly involved as in the regulation dealt with in *Liversidge's* case (3). Mr. Scott Henderson submitted that the principle laid down in these cases must be restricted to Defence Regulations made under the Emergency Powers (Defence) Act, 1939, which gave power to make Defence Regulations for what may be described as war purposes. I do not so construe these authorities. Words in a statute of course must be construed in their context. It must, however, be obvious that Parliament can confer the same unlimited discretion on Ministers for purposes other than war purposes. Construing the words in their natural meaning and in the light of the authorities, I think Parliament has done so in this part of this Act. In *In re Bowman* (4), Swift J. left open the question whether under the Housing Act, 1930, the Minister's confir-

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(1) [1942] A. C. 206, 233.

(3) [1942] A. C. 206.

(2) [1943] 2 All E. R. 546.

(4) [1932] 2 K. B. 621.

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mation of a Clearance Order made by a local authority could be challenged by a person aggrieved on the ground that there was no evidence or material on which the Minister could have been reasonably satisfied. There are to my mind important differences between that Act and the present Act, which may result in a different construction on this point. I am not suggesting one way or the other whether they do, but there is nothing in what was said by Swift J. in that case which assists the applicants here. We were also referred to *In re Ripon (Highfield) Housing Confirmation Order, 1938 (1)*, but in the section being construed in that case there were no words such as "if the Minister is satisfied" or "if it appears to the Minister." The section relied on clearly limited the Minister's jurisdiction to authorize the acquisition of land, by excluding certain lands, and it was open to a party to establish before the courts that land of which the Minister had purported to authorize the acquisition, was within the excluded category. The case is worth a reference as showing the difference in language when matters are for a decision by the court on evidence and when matters are primarily, at any rate, to be decided by a Minister as a matter of his discretion and policy.

There is a further objection which on the particular facts of this case might logically come first. The argument for the applicants assumes that a unit of ownership cannot be included in the area covered by the order if it is to be left in its present condition, or, if it has been demolished, is to be reconstructed as it was before. I agree with the argument of the Attorney-General that this is to disregard the words "as a whole" in the phrase "should be laid out afresh and redeveloped as a whole." In other words, if the Minister is satisfied that the area as a whole should be laid out afresh, the whole area can be covered by an order although in the Minister's view at this stage certain buildings here and there might well be incorporated in the fresh lay-out in their existing or pre-damage condition. There is obvious convenience in this as the ideas of the Minister or the authority at the time when a s. 1 order is made are not final, and will take a considerable period before they can be acted on and the new lay-out completed. Circumstances may change and make a different lay-out desirable and some inconvenience might be caused if isolated units of ownership were omitted and had to be made the subject of further applications under other provisions of the Act.

(1) [1939] 2 K. B. 838.

Mr. Scott Henderson based part of his argument on a submission that the Minister having ordered a public local inquiry placed himself in a quasi-judicial position. This does not affect the point which I have already dealt with that the Minister is not confined to the evidence given at that inquiry. Reliance was placed on *Errington v. Minister of Health* (1). Under the Housing Act in question there the Minister had to hold a public inquiry if objections were not withdrawn. The position was different in this and other respects. The court held that the Minister could not, after the public inquiry, had been held, receive ex parte statements from the local authority which were not communicated to the objectors, dealing with the subject-matter of the objection as investigated at the inquiry. I am prepared to assume without deciding that that principle would apply to this Act, although there are considerable differences on which an argument that it is inapplicable could be based. There is, however, no evidence or suggestion that the Minister did in this case that which was held to invalidate the order in *Errington's* case (1). There are other cases, such as *Price v. Minister of Health* (2), in which documents received by the Minister from the authority some time before the public inquiry did not have to be disclosed to objectors. The learned judge delivered his main judgment in the case of *Phoenix Assurance Co. v. Minister of Town and Country Planning* (3) heard before this case. There is no appeal in that case, but the learned judge in deciding in favour of the applicants applied the principles he had laid down in the *Phoenix* case. He held that the words "is satisfied" prima facie mean satisfied on reasonable grounds. No doubt Parliament always intends that a Minister should act reasonably, but this is a matter on which opinions may differ and the question is whether it is for the Minister or the courts to impose the standard. The learned judge took the view that he was entitled to inquire into the sufficiency of the grounds and that taking the evidence to which I have referred as the only evidence before the Minister there was no evidence that the applicants' property was to be freshly laid out. I have, I think, sufficiently stated my reasons for coming to a different conclusion. It would be undesirable and impossible to formulate precisely what evidence and in what circumstances the courts might examine the Minister's decision under this Act or Acts with similar provisions. It has often

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(1) [1935] 1 K. B. 249.

(3) Unreported.

(2) [1947] W. N. 33.

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been said in this class of case that the court will interfere if there is evidence of bad faith in the steps which lead up to the making of an order. Lord Dunedin in dealing with an Act under which the Minister had power to confirm a scheme submitted by a local authority said that if one can find that the scheme is inconsistent with the provisions of the Act which authorizes the scheme, the scheme will be bad (*Minister of Health v. R.* (1)). To take, no doubt, an impossible example under the present Act, if an authority submitted an application under s. 1 which showed on the face of it that the area covered had suffered no or very little war damage and the Minister purported to make an order, it might be said that the application was not in accordance with the provisions of the Act, and, therefore, could not found the Minister's jurisdiction. I have added these observations in case anything I have said might be construed as laying down that in no case can a party succeed in proceedings under s. 16, except where some definite provision of the Act such as the giving of notices has not been complied with, or where he takes upon himself the burden of establishing bad faith.

For the above reasons I think this appeal should be allowed.

WROTTESELEY L.J. The Minister is entitled to make the order set out in s. 1, sub.s. 1, in the following circumstances: It can only be made on the application of a local planning authority. It must deal with a part or more than one part of that authority's area. There is no question that both these conditions were fulfilled in this case. It must be shown that the part under discussion consists of land which has sustained war damage. If other land is included in the part of the area, then it must be shown that that other land is contiguous or adjacent to the land which has sustained war damage. These conditions also were fulfilled. Finally, the Minister must be satisfied that for the purpose of dealing satisfactorily with extensive war damage to the authority's area, the part of the area, the subject of the application, should be laid out afresh and redeveloped as a whole. Once the Minister is satisfied as to this, he may make an order declaring the whole of the land in the part of the area subject to compulsory purchase for dealing with war damage, or he may so declare in regard to any part of the land inside the area. In this case he made an order comprising the whole of the area covered by the application.

(1) [1931] A. C. 494.

It is to be noted that the Minister before making an order must be satisfied that the part of the area designated needs to be laid out afresh and redeveloped as a whole, and not that every piece of land inside the area should need this treatment. Even so, speaking for myself, I think that where a crescent of dwelling-houses, with a private road running along the front of it, and a private garden beyond the private road, kept for the use and enjoyment of the householders, is so dealt with that the private road is abolished and a public ring road for industrial traffic substituted for it; and the private garden is swept away to make room, partly for the ring road and partly for a public recreation ground, then that very area will have been laid out afresh and redeveloped. And that will be the case even if the existing facade be retained and the demolished houses replaced. I test the matter in this way. I will suppose that the financial interest of the owners of the houses in The Crescent had lain in the opposite direction from that contended for. Can anyone picture that the Town Planning Authority could claim successfully that The Crescent with its private approach road and its private garden was not laid out afresh, and so redeveloped as a whole, when both private approach road and private garden were swept away, and a new thoroughfare at a different level was constructed so as to subtend what is left of the arc of The Crescent, after abolishing one of its horns.

If I am right in this, the applicants fail in what I may call the raw material of their objection. At the same time, had this not been the case, I agree with the Master of the Rolls that the inquiry which the Minister chose to hold was an inquiry, not into the merits or demerits of the Town Planning Authority's plan, but into the objections lodged by the applicants, among others, not to the lay-out plan, but to the designated area. And the propriety of the Minister's decision to declare this part of the authority's area subject to compulsory purchase, is not to be challenged or tested in the courts by reference to what emerged in that inquiry as to the authority's proposed lay-out, or the objects aimed at by the authority in designating the area. The Minister has other sources of information, and is not in any sense tied to that lay-out. I am far from saying that occasions may not arise where it will be demonstrated to the court that the conditions laid down in the Act under which the Minister may make a declaratory order, have not been fulfilled, or even that the Minister has

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C. A. made an order which does not conform with the provisions of the Act. But this is not such an occasion. I agree that the appeal succeeds.

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Appeal allowed.

Solicitors: *Treasury Solicitor; Gregory, Rowcliffe & Co., for Bond, Pearce, Elliott & Knappe, Plymouth.*

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May 13.

Lord Goddard
C.J.,
Singleton and
Oliver JJ.

REX v. RECORDER OF LEICESTER.

Bastardy—Affiliation summons—Order in favour of applicant—Appeal to quarter sessions—Evidence given by respondent accepted by recorder—Order of justices reversed—Conviction of respondent of perjury in respect of evidence given—Certiorari to quash order allowing appeal.

The respondent in affiliation proceedings, against whom an order had been made by justices, appealed to quarter sessions. The appeal was heard by the recorder who accepted the evidence of the respondent in regard to material facts and allowed the appeal. The respondent was subsequently, on his own confession, convicted of perjury in respect of the evidence given by him on his appeal. On an application for an order of certiorari to quash the order of the recorder allowing the appeal, on the ground that it had been obtained by fraud:—

Held, that certiorari would lie.

Reg. v. Gillyard (1848) 12 Q. B. 527 followed.

APPLICATION FOR ORDER OF CERTIORARI.

The applicant, J. D. Wood was granted an affiliation order against one D. C. Draper by justices of the City of Leicester. Draper appealed to quarter sessions against the order and the appeal was heard by the Recorder of Leicester, who accepted the evidence of the appellant with regard to material facts in connexion with the birth of the child and quashed the order of the justices. Subsequently, on his own confession, Draper was convicted on an indictment for perjury in respect of the evidence given by him at the hearing of the appeal. The

applicant applied for an order of certiorari to quash the order of the recorder allowing the appeal on the ground that it had been obtained by fraud.

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E. Ling Mallinson for the applicant. Certiorari will lie to quash an order of an inferior court which has been obtained by fraud. In *Reg. v. Gillyard* (1) the court quashed a conviction on the ground that it had been procured by conspiracy and subornation of perjury. Here the recorder accepted the perjured evidence given before him by the appellant and allowed the appeal, and the court has jurisdiction to quash his order by proceedings for certiorari.

The respondent did not appear.

LORD GODDARD C.J. stated the facts and continued. It is clear in this case that the present respondent who was appellant in the appeal to quarter sessions committed perjury on a most material fact for which he has been convicted on indictment for perjury. Unfortunately the recorder believed his evidence and the only question on which this court required to be satisfied was whether or not certiorari was the remedy available to the applicant. Certiorari is a remedy of a peculiar character and there is a great deal of authority as to when it will and when it will not lie. The leading case on the point before us appears to be *Reg. v. Gillyard* (1), and it is interesting to note that in that case the Attorney-General himself obtained a rule to quash a conviction which had been secured against a man, on the ground that the proceedings against him were fraudulent in that a wholly untrue charge had been made by the prosecutor, a charge which he knew to be untrue and which he had made for the purpose of exculpating himself. The court held that when a decision of a court which resulted in a conviction had been obtained by fraud, certiorari was a remedy which was open to the subject who had been convicted and they accordingly made the rule absolute and quashed the conviction. That seems to have been followed in *Reg. v. Alleyne* (2) and in *Colonial Bank of Australasia v. Willan* (3), the Judicial Committee of the Privy Council obviously admitted the principle that if the court was satisfied that there had been fraud in the proceedings, the remedy of certiorari would lie. In the present case there can be no doubt that there was the grossest fraud on

(1) (1848) 12 Q. B. 527, 530.

(3) (1874) L. R. 5 P. C. 417.

(2) (1854) 4 E. & B. 186.

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the part of the person who had instituted the appeal to quarter sessions. It is unnecessary in the present case to consider whether certiorari would lie if the perjury had been committed by a respondent to an appeal, though I am inclined to think that it would. At any rate in this case perjury has been admitted by the person who set the appeal in motion and obtained thereby the order which it is now sought to quash. In those circumstances I think the order for certiorari must go and the order of the recorder must be quashed, with the result that the order of the justices remains.

SINGLETON J. I agree. In the words of Erle J. in *Reg. v. Gillyard* (1), to which my Lord has referred: "This court has authority to correct all irregularities in the proceedings of inferior tribunals, which in this case have been resorted to for the purpose of fraud. In quashing this conviction we are exercising the most salutary jurisdiction which this court can exercise." In the present case the order of the inferior court was obtained by fraud and perjury, and, so far as I know, procedure by certiorari is the only one which can be adopted to put right the wrong which has been done.

OLIVER J. I agree.

Application granted.

Solicitors for the applicant: *Wilberforce Allen & Bryant, for Bertram F. Chapman, Leicester.*

(1) 12 Q. B. 527, 530.

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Apr. 23;
May 12.Lord Goddard
C.J.,
Atkinson and
Oliver JJ.

CARR v. THE DECCA GRAMOPHONE COMPANY, LIMITED.

Factory Acts—Dangerous machinery—Circular saw—Fencing—Contravention of regulations—Delegation by occupier to workman of duty under regulations—Whether occupier had taken all reasonable steps to prevent contravention of regulations—Woodworking Machinery Regulations, 1922 (St. R. & O. 1922, No. 1196), regs. 10 (b) (ii), (c)—Factories Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 67), s. 130, sub-s. 2, s. 137.

Where an employer is prosecuted for a contravention of

regulation 10 of the Woodworking Machinery Special Regulations, 1922-1945, which deals with the manner in which circular saws are to be fenced, and the defence of the employer is that the contravention was that of a workman whose duty it was to use and maintain the machine in proper adjustment, s. 130, sub-s. 2, of the Factories Act, 1937, provides the employer with a defence unless it is proved by the prosecution that he failed to take all reasonable steps to prevent the contravention.

The observation made by du Parc L.J. in *Smith v. A. Baveystock & Co., Ltd.* [1945] 1 All E. R. 531, 535, were made with reference to the particular circumstances of that case, and did not purport to lay down any general proposition of law.

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CASE STATED by a metropolitan police magistrate.

Two informations were preferred at a court of summary jurisdiction by the appellant, Charles Francis Carr, an inspector of factories, against the respondents, the Decca Gramophone Co., Ltd., for that they on May 18, 1946, were the occupiers of a factory within the meaning of the Factories Act, 1937, in Lambeth, and as such occupiers being bound to observe the Woodworking Machinery Special Regulations, 1922 to 1945 did contravene reg. 10 (b) (ii.) of the regulations in that at a certain circular saw the distance between the front edge of the riving knife and the teeth of the saw exceeded a half-inch at the level of the bench table, whereby the respondents were guilty of an offence under s. 130, sub-s. 1, of the said Act, and (2.) did contravene reg. 10 (c) in that the guard for the top of a certain circular saw, being provided with a flange at the side of the saw farthest from the fence, was not kept so adjusted that the said flange extended below the roots of the teeth of the saw, whereby the respondents were guilty of an offence under s. 130, sub-s. 1, of the said Act.

On the hearing of the informations, which were heard together on October 15, 1946, the following facts were proved or admitted. At all material times on and prior to May 18, 1946, the respondents were the occupiers of premises at 1/3, Brielon Road, S.W.9, which were a factory within the meaning of the Factories Act, 1937. On May 18, 1946, there was in motion at the said factory a machine which was a circular saw within the meaning of the said regulations. The circular saw was fitted with (a) a riving knife which had a smooth surface and was strong, rigid and easily adjustable, and (b) a top guard which was strong and easily adjustable, and had a flange at the side of the saw farthest from the fence. On May 18, 1946, when the circular saw was being used by one Alexander Cutts, the distance

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between the front edge of the riving knife and the teeth of the saw at the level of the bench table exceeded a half inch in that it was four and three-quarter inches. The riving knife could easily have been so adjusted that the distance did not exceed a half-inch. On May 18, 1936, when the circular saw was being used by Cutts the top guard was not so adjusted that the flange thereof extended below the roots of the teeth of the saw: at the crown of the saw the bottom of the flange was three and a quarter inches above the roots of the teeth of the saw and at the front of the saw the bottom of the flange was five and a quarter inches above the roots of the teeth of the saw. The top guard could easily have been so adjusted that the flange thereof extended below the roots of the saw. The said Cutts was first employed by the respondents on May 13, 1946. He had been asked by the respondents when he was first employed by them whether he was an experienced sawyer, and he had told them, as was the fact, that he had had eighteen years' experience as a sawyer, and that he knew of the rules and regulations relating to woodworking machinery. The said Cutts was competent to work and reset the said saw without instructions. No instructions were ever given to Cutts by the respondents or anyone on their behalf as to the working of the saw or the adjustment of the guards thereof. The working of the saw and the adjustment of the guards thereof by Cutts were never supervised by the respondents or by anyone on their behalf.

At the close of the case for the prosecution counsel for the respondents called no evidence and submitted: (i.) that the respondents were entitled to delegate to a workman the performance of the duty under regs. 10 and 21 of the aforesaid regulations, and that on the evidence it was clear that the respondents had delegated to Cutts the performance of the said duty. (ii.) That the contravention of the aforesaid regulations was a contravention by Cutts, and that it had not been proved that the respondents had failed to take all reasonable steps to prevent such contravention. (iii.) That the respondents were not guilty of either of the offences charged against them.

On the part of the appellant it was contended: (i.) That in order to show a delegation of duty by the respondents it was necessary for them to show some specific and positive act on their part. The mere employment of a skilled workman did not in the absence of any supervision or instruction amount to a sufficient delegation: that it was necessary for the respon-

dents to show that they had used all due diligence to enforce the execution of the regulations and that the evidence showed that they had not exercised any diligence. (ii.) That although the respondents had given to Cutts a proper machine, they had not given him any instructions or supervised him in any way or taken any steps to see that the riving knife and top guard were properly adjusted, and it had therefore been proved that they had failed to take all reasonable steps to prevent the contravention of the regulations. (iii.) That the respondents were guilty of both the offences charged against them.

The magistrate said that he was of opinion that the respondents had delegated to Cutts their duty under the said regulations, in that he was to their knowledge an experienced sawyer of some eighteen years' experience with a knowledge of the rules and regulations relating to woodworking machinery and that they had handed over to him to be used by him a saw of which the guard and riving knife were perfectly adequate and required only to be properly adjusted, and that he felt bound in view of the decision of the Court of Appeal in *Smith v. A. Baveystock & Co., Ltd.* (1) and in particular the judgment of du Parc L.J. (2), to hold that the respondents were not guilty of either offence, and he accordingly dismissed both informations, but at the request of the appellant stated a case for the decision of the High Court. The question on which the opinion of the court was desired was whether on the above statement of facts the magistrate had come to a correct determination in point of law.

Arthian Davies for the appellant. On the findings of fact there is no evidence of a proper delegation by the respondents of their duties under the regulations. Even if there was a delegation that will not help the respondents because the obligation to have the riving knife and the guard at the prescribed distance from the saw is an absolute duty. The occupier of a factory may escape liability for a breach of the regulation if he brings an information under s. 137 of the Factories Act, 1937, against the person whom he alleges was guilty of the contravention. The duty under reg. 21 of seeing that the riving knife and the guard are at the prescribed distances is one that lies upon the occupier of the factory and not upon a workman, reg. 23 relates to the duty of an employed person. There is no express finding that there had been a contravention

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(1) [1945] 1 All E. R. 531, 532. (2) Ibid. 535.

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of the regulation by Cutts. Singleton J. in *Lay v. D. & L. Studios, Ltd.* (1) discusses the difference between the duties of the occupier of a factory and those of the workman. There is no evidence that during the five days Cutts was employed by the respondents that the guard and riving knife were ever properly adjusted or that the respondents instructed Cutts how to adjust them or saw that he did properly adjust them. It is clear from the judgment of Goddard L.J. in *Smith v. A. Baveystock & Co., Ltd.* (2) that if the duty of the occupier of a factory is delegated to a workman and that duty is not carried out by the person to whom the duty is delegated the duty of the occupier has not been discharged. That case has no application in the present case because in that case there were no proceedings for breach of a statutory duty, it was a civil action, and further, the plaintiff could not in a civil action set up his own wrongful act. Section 130, sub-s. 2, of the Act of 1937, does not deal with breaches of duty imposed on the occupier of a factory, it deals solely with breaches of duty of an employed person. An occupier of a factory can only escape liability for contravention of his duties under the regulations by taking proceedings under s. 137 against the person whom he alleges was guilty of that contravention. Before an occupier can delegate his obligations with regard to the riving knife and guard he must first see that they are in a proper position. There is no evidence that the respondents ever did that. In *Vincent v. Southern Ry.* (3) Lord Cave L.C. held that the duty of the railway company to provide a look-out man in any case of danger, and to see that he was instructed to act, was an absolute duty, and that the company did not comply with the rule by merely making regulations under which the foreman of a gang was entrusted with the duty of appointing a look-out man. If s. 130, sub-s. 2, afforded a complete defence to the occupier of a factory s. 137 was not required. The Court of Appeal held in *Vyner v. Waldenberg Brothers, Ltd.* (4) that nothing short of a definite delegation of authority and duty with regard to maintenance to a person properly qualified and instructed could absolve the occupier of the factory from his duties under regs. 10 and 21. In the present case the summons was under reg. 10 and not under reg. 21. If the contention that an employer when charged with his own default can say that it was the default of a workman is correct, the

(1) [1944] 1 All E. R. 322, 325.

(3) [1927] A. C. 430.

(2) [1945] 1 All E. R. 533.

(4) (1945) 61 T. L. R. 545.

workman might be found to be guilty of a criminal offence notwithstanding that he was not present at the trial, whereas if proceedings had to be taken against him under s. 137 he must be brought before the court before he is found guilty of that offence.

T. F. Southall for the respondents. It is admitted that the machine that was supplied to Cutts was capable of being easily adjusted. If Cutts was a competent workman, as he was found by the magistrate to be, he was competent for the purpose of carrying out the regulations and maintaining the machine. The facts of the present case are similar to those in *Smith v. A. Baveystock & Co., Ltd.* (1) and the observations of du Parc L.J. in that case (2) are applicable to the present case. Section 130, sub-s. 2, does not relieve the occupier from liability, but under that section the onus is on the prosecution of proving the offence. [Lord Goddard C.J. There is an absolute duty on the occupier of the factory to maintain the riving knife as close to the saw as practicable. In the present case the riving knife was not maintained as close as practicable.] The object of the regulations was to relieve the occupier from an absolute duty. If there is delegation of the duty of an occupier to a competent person the duty of the occupier has been performed, and if subsequently there is a contravention of the duty properly to maintain the machine, the breach of the regulations is that of the person to whom the duty has been delegated.

Arthian Davies in reply. The offences charged are breaches of duty which is an absolute duty.

Cur. adv. vult.

May 12. LORD GODDARD C.J. read the following judgment of the court. This is a special case stated by a metropolitan magistrate who dismissed two informations preferred against the respondents for contravening reg. 10 (b) (ii.) and reg. 10 (c) of the Woodworking Machinery Special Regulations, 1922-1945, made under the Factories Act, 1937. Regulation 10 provides for the manner in which circular saws are to be fenced. The first contravention alleged was that the distance between the front edge of the riving knife and the teeth of the saw exceeded half an inch at the level of the bench table, and the second was that the guard for the top of the saw, being provided with a flange at the side of the saw farthest from the fence, was not

(1) [1945] 1 All E. R. 531.

(2) *Ibid.* 535.

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kept so adjusted that the flange extended below the roots of the teeth of the saw. The facts found by the learned magistrate show that on May 18, 1946, the date of the alleged offences, the saw in question was in motion at the factory of which the respondents were occupiers. It was fitted with a proper riving knife and an adequate guard, but neither was adjusted in accordance with the regulations, so it cannot be contended that it was properly or securely fenced. It is found that both the riving knife and the guard could easily have been adjusted so as to conform with the regulations, and from that finding we infer that the excessive distance between the guard and wood was not due to the nature of the work then being done. There is nothing to suggest that they were as close as practicable. Nor is there any suggestion that the actual work rendered the use of the guard impracticable so that advantage could be taken of reg. 23. The machine was being worked by a man named Cutts who had first been employed by the respondents five days earlier. He had told them that he was a sawyer of eighteen years' experience and that he knew the regulations. While the magistrate finds that Cutts was competent to work and reset the saw without instructions, he also finds that no instructions were given to him as to its working or adjustment, nor were those matters ever supervised by anyone on the respondents' behalf. Therefore it follows that they took Cutts at his own valuation as to experience and knowledge and took no pains to find out whether, accepting that he had full knowledge of the regulations, he was a careful workman who could be trusted to see that the regulations were observed.

It seems to us clear that the magistrate intended to hold that the contravention of the regulations in this case was a contravention by Cutts. It was his duty to use and maintain the machine in proper adjustment. This he failed to do and the contravention therefore was in respect to duties of the person employed and the contravention of a regulation which expressly imposed a duty upon him. In these circumstances it seems to the court that s. 130, sub-s. 2, provides the employer with a defence unless it is proved that he failed to take all reasonable steps to prevent the contravention. It was argued for the appellant that a breach of a duty by the workman would not avail the employer as a defence unless he had taken the steps provided by s. 137, which provides for the actual offender being brought before the court when, if the employer proves to the satisfaction of the court that he has used all due diligence to

enforce the execution of the Act, and that the other person has committed the offence without his consent, connivance or wilful default, the other person shall be convicted and not the occupiers. We are unable to accede to that contention. Section 130, sub-s. 2, expressly provides that, in the circumstances there mentioned, the employed person shall be guilty of an offence and the occupier or owner shall not be guilty of an offence, and where the contravention is by the employed person the onus is on the prosecution to prove that the owner failed to take reasonable steps to prevent the contravention. Section 137 deals, in our opinion, with a different state of affairs. It is not in our opinion, dealing with the case in which employed persons are guilty of a contravention. It is, we think, intended to provide for such a case as might occur if some contractor's workman who was present in the factory interfered with the guards of a machine, so that it was left in an unguarded or unsafe condition. The fact that it was in an unsafe condition is a breach of the occupier's absolute duty, but the section gives him a defence if he can show that the contravention was caused by someone else. But in that case the onus of proving all reasonable care is the reverse of what it is in s. 130, sub-s. 2, and it is for the occupier to prove that he was not guilty of want of care. The learned magistrate has not, however, given any direct finding whether it was proved in this particular case that the respondents did not exercise all reasonable care. We think that it may be that he misunderstood the observations of du Parcq L.J. in *Smith v. A. Baveystock & Co., Ltd.* (1) to which he refers. The learned Lord Justice was not, in our opinion, laying down any proposition of law. What was decided in that case was that in its particular circumstances there had been no breach of the regulations by anyone. A piece of timber of varying thickness was being cut and the guard was adjusted so as to permit of the thickest part being cut. This was permitted by reg. 21 as it would have been impracticable from a common sense point of view to keep stopping and readjusting the machine according to whether the actual part being cut was one inch, two inch or three inch. In expressing the opinion that in that case had there been a prosecution the employer might have had a defence, the learned Lord Justice was dealing with a man who had been working on a circular saw for two and a half years since he left the army at the employers' works and for some part of his

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previous service with the employers extending over twelve years. The learned Lord Justice said that in those circumstances he thought that it might have been very difficult to say that the employers had not taken reasonable steps. We repeat that he was there dealing with the particular facts of that case and was making no observations of general application. He was certainly not dealing with such a case as this, where, according to the magistrate's findings, the workman had only been employed for five days at these particular works and during that time had not been subjected to any supervision to find out whether he was a careful workman who could be trusted to observe the regulations.

This case must, therefore, go back to the magistrate with a direction that he find whether on the facts which he stated were proved by the prosecution he is satisfied that the respondents did take all reasonable steps to prevent the contravention of the regulations. If he finds that the respondents did not take all reasonable care he will convict and the appellant will have the costs of this appeal; if he finds that they did, the dismissal will stand and the respondents will have the costs in this court.

*Case remitted to magistrate
for a further finding.*

Solicitor for appellant: *Solicitor, Minister of Labour and National Service.*

Solicitors for respondents: *Rowe & Maw.*

R. F. S.

*Dictum of LORD GREENE, M.R., at
p. 742, applied. SWINDON CORPN.
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May 5, 6.

Lord Greene
M.R.,
Wrottesley L.J.
and
Lynskey J.

*Local government—Planning scheme—Validity of proposed provision—
Land not to be used for fun fair "without consent of council"—
Town and Country Planning Act, 1932 (22 & 23 Geo. 5, c. 48)
ss. I, II, 12—Town and Country Planning (Interim Development)
Act, 1943 (6 & 7 Geo. 6, c. 29), s. 5.*

The insertion in a town planning scheme of a provision that the use of land in the area affected by the scheme for a fun fair was not to be commenced without the consent of the local authority is within the powers conferred on a local authority by the Town and Country Planning Act, 1932, s. I and s. II, sub-s. I (a) and

therefore a notice of intention to prohibit the use of certain land for a fun fair is a good notice when it is based on a resolution to insert such a provision in a proposed scheme and issued in accordance with s. 5 of the Town and Country Planning (Interim Development) Act, 1943.

Decision of Divisional Court, ante p. 57, affirmed.

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APPEAL from the decision of the Divisional Court (1) (Lord Goddard C.J., Henn-Collins and Cassels J.J.) on a case stated by Brighton justices.

On March 13, 1946, a complaint was preferred by the appellant, Taylor (hereafter called the appellant) against the Brighton Borough Council under the Town and Country Planning (Interim Development) Act, 1943, s. 5 and sch. I., by way of appeal against a notice served by the council on the appellant on January 16, 1946, stating their intention to prohibit the use of certain land belonging to the appellant as a fun fair.

At the hearing the following facts were proved or admitted. A resolution to prepare a scheme under the Town and Country Planning Act, 1932, was in force at the date of the commencement of the Act of 1943, and was still in force, with respect to an area which included the land and buildings, the subject of the present appeal. Certain developments of the land in question consisting of its use for carrying on a fun fair had been carried out after July 22, 1943, otherwise than in accordance with an interim development order or of a permission granted under that order. On January 16, 1946, the council, acting as interim development authority, served on the appellant a notice under s. 5 of the Act of 1943 stating their intention at the expiration of twenty-eight days to prohibit the use of the land for the purpose of a fun fair on the ground, inter alia, that it was intended to provide in the planning scheme that the use for a fun fair of land, whether forming the site of a building or not, was not to be commenced without the consent of the council. In satisfying themselves that it was necessary and expedient to prohibit the use of the land in question as a fun fair the council had regard to a resolution passed by them on December 14, 1944, resolving that appropriate provisions be included in their planning scheme to the above effect.

It was contended for the appellant that the intention of the council to prohibit the use of the land as a fun fair was an

(1) Ante, p. 57.

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intention to do something not authorized by the Act ; that the council had no power to insert in a scheme the proposed provision ; and that the powers conferred by the Act of 1932 were analogous to the powers to make by-laws and must be exercised accordingly.

It was contended for the council that power to insert the proposed provision was conferred by s. 11 of the Act of 1932 ; that the doctrine of reasonableness applicable to by-laws did not apply to a planning scheme ; and that even if the question of reasonableness were material, the provision in question was not unreasonable because the council did not propose to prohibit fun fairs absolutely, but merely to make the use of land for the purpose subject to their consent.

The Divisional Court, confirming the decision of the justices, held that insertion in a town planning scheme of a provision that the use of land for a fun fair was not to be commenced without the consent of the local authority was within the powers conferred on such an authority by the Act of 1932 and therefore that a notice of intention to prohibit the use of certain land for a fun fair, based on a resolution to insert such a provision in their planning scheme and issued in accordance with s. 5 of the Act of 1943, was a good notice. The appellant appealed.

H. A. Hill and Kerrigan for the appellants. Before 1919 an owner who developed land ran the risk of finding that his building ran counter to a scheme and of having it pulled down or altered without compensation. The Housing and Town Planning, &c., Act, 1919, started "interim development" "protection." Application for permission to develop was not necessary under that Act, but if permission was obtained, it gave protection against alteration or demolition without compensation. There was no appeal machinery in the Act itself, but the general order of 1922 gave a right of appeal. That was the position before the Town and Country Planning Act, 1932, which by s. 13 gave the local authority power, having regard to the terms of any proposed scheme, to prohibit the use of land (or require the discontinuance of such user) in a manner inconsistent with a proposed scheme. There are similar powers in the Town and Country Planning (Interim Development) Act, 1943. The council here has prohibited the use of the appellant's land as a fun fair by reason of a clause in the proposed scheme and the question is whether that clause

could lawfully be included in the scheme. Until the Act of 1943 was passed a man could not be stopped in the development of his land till a scheme came into force, but now it suffices if the development is in conflict with proposals for a scheme. A statute of this kind must, however, be read against the background of the common law and under the common law a power, even a statutory power, must be exercised bona fide and with due regard to the common rights of persons. Statutory powers must be exercised reasonably. The nearest analogy to a statutory power is the power of a local authority to make by-laws for "good rule and government," and the exercise of such a power has to be reasonable: See *Kruse v. Johnson* (1).

[LORD GREENE M.R. Has that case ever been held applicable to regulations made by a Minister under a statutory power?]

There is no such thing as an absolute discretion exercised without regard to the common law.

[LORD GREENE M.R. The common law does not control Parliament, and if Parliament confers on a Minister a power to make regulations how can the court inquire into those regulations beyond ascertaining whether they are within the power?]

There is an implication that the discretion conferred on the Minister shall be exercised reasonably. The proposed provision as to fun fairs is unfair to amusement caterers. Other traders can look at the scheme map and find out where they may go. This seems to be an attempt to bring amusement caterers under some form of licensing control. This may be contrasted with the provision of the Public Health Act, 1936, s. 107, as to offensive trades.

When it is intended to give the local authority a discretion, it must be found in the Act itself. There is no such provision in s. 11, sub-s. 1 (a) of the Act of 1932, which provides that a scheme shall "contain such provisions as are necessary "or expedient for prohibiting or regulating the development "of land"; and it may be contrasted with s. 12, sub-s. 1 (c) which provides that a scheme may include provisions "regulating or enabling the responsible authority to regulate the "size, height, design and external appearance of buildings." It is therefore essential for the Minister to have central control. The word "scheme" itself is significant. It is not intended that the members of the public should be able to see how the

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local authority propose to plan the area, and as to fun fairs it is left to the discretion of the local authority and no-one will know how the development is to take place. Another objection to the proposed provision is that it confers no right of appeal against the council's decision.

Harold Williams for the council. The Divisional Court was right in its decision and for the reasons given by the judges. The relevant statutory provisions are definite and were complied with. The council acted in accordance with a provision intended to be inserted in the scheme. That can only be attacked if there was no power to put that provision into the scheme. The power of inserting provisions in a scheme is very wide, and the provision was authorized by s. 1, sub-s. 1, and s. 11, sub-s. 1 (a) of the Act of 1932. It is said that the provision is unreasonable but that cannot be in view of the wide provisions of the Act.

[He was stopped as to reasonableness.]

The appellant complains that he was put in an unfair position through the matter being left in the discretion of the council, but under s. 10 of the Act which deals with interim development, it is beyond question that he could have approached the council for consent, and the power to consent is in the widest terms and independent of any intent to put a provision in any scheme. It is because of the failure of the appellant to do this that the court is now being asked to say that a provision making the commencement of fun fairs subject to the council's consent cannot be inserted in the scheme. There is no reason why such a provision should not be inserted. Section 1, sub-s. 1 and s. 11, sub-s. 1 (a) are wide enough to cover it. There were three things the council might have done : (1.) to say " You may have a fun fair anywhere " ; (2.) to say " You may not have a fun fair anywhere in the area " ; and (3.) to say " You may have no fun fair without our consent, " for we desire to retain control." How can there be any objection to (3.) which is less severe than (2.) ? It is complained that there is no right of appeal against the council's decision but even if that were true, it does not make the provision in question *ultra vires*.

Kerrigan replied.

LORD GREENE M.R. : When the Town and Country Planning (Interim Development) Act, 1943, came into operation, there was in preparation under the necessary resolution a town

planning scheme for a certain area in Brighton known as the "Old Borough No. 2 Planning Scheme." It was proposed to include in that scheme certain matters provided for in a resolution which the council had passed in December, 1944. The resolution was to the effect that the use of land for a fun fair should not be commenced without the consent of the council and the resolution defined what was meant by "fun fair." The appellant in 1945 started a fun fair on certain property, of which he was the lessee, lying within the area of the proposed scheme and on January 16, 1946, the council of the county borough, pursuant to the provisions of s. 5. of the Act of 1943, served a notice on the appellant in which they stated that they were satisfied that it was necessary and expedient to do so and that they proposed not less than twenty-eight days from the date of the service of the notice to prohibit the use of the appellant's land for the purpose of a fun fair on certain grounds, of which the first was "That it is intended to provide in the last-mentioned scheme"—that is the one I have referred to—"that the use of a fun fair shall not be commenced without the consent of the council." Under sub-s. 1 of s. 5 of the Act of 1943, the council may, where they are satisfied that it is necessary or expedient so to do "having regard to the provisions then proposed to be included in the scheme . . . where the development consists of any use of the land or any building thereon, by order prohibit that use."

One question, and one only, arises on this appeal, and it is whether it is competent to the council to include in its scheme a prohibition of this character restricting the use of land within the area as a fun fair without the consent of the council. If it cannot lawfully be included in a scheme, it cannot fall within the words of sub-s. 1 of s. 5, as being a provision proposed to be included in the scheme. Those words must mean "proposed to be lawfully included in the scheme." Therefore, the question that we have to decide is whether or not this proposal is one which could lawfully be included in the scheme. The appellant appealed to a court of summary jurisdiction, in accordance with the provisions of the sch. I to the Act of 1943. That court decided against his contention and a case was stated which came before a Divisional Court of the King's Bench Division, who dismissed the appeal.

The question whether or not such a provision can lawfully

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be included in a planning scheme under the relevant Act, which is the Town and Country Planning Act, 1932, depends, of course, on the true construction of that Act. It is to be borne in mind that the ultimate sanction to a scheme under that Act falls to be given by the Minister subject to the control by Parliament, for which the Act provides, and provided a scheme comes within the language of the Act the question whether or not a particular provision should be included in it must depend on the question whether the appropriate authority considers it to be "necessary or expedient for prohibiting or regulating the development of land in the area to which the scheme applies and generally for carrying out any of the objects for which the scheme is made, and in particular for dealing with any of the matters mentioned in the Second Schedule to the Act." I am quoting the language of s. 11, sub-s. 1 (a) of the Act of 1932, to which I shall return presently. The words "such provisions as are necessary or expedient" must, in my judgment, mean "necessary or expedient in the opinion of the authority who has the ultimate control of the scheme"; that is to say, the Minister, or, in the last resort, Parliament. The test set up by the words "necessary or expedient" in my opinion is not for the court to decide. Provided a provision which is proposed to be inserted in a scheme is one that can lawfully be inserted in that scheme, the question of whether it is necessary or expedient to insert it is not a matter for the court. The question, therefore, here is not whether the present proposal is necessary or expedient, but whether it can lawfully be inserted in a scheme at all. It becomes necessary to look and see what are the limits laid down by Parliament as to the extent and scope of a planning scheme under the Act of 1932. The Act starts off with a most comprehensive power. The rubric, which includes only s. 1, is "Scope of planning schemes," and this section is as follows: "A scheme may be made under this Act with respect to any land whether there are or are not buildings thereon, with the general object of controlling the development of the land comprised in the area to which the scheme applies, of securing proper sanitary conditions, amenity and convenience, and of preserving existing buildings or other objects of architectural historic or artistic interest and places of natural interest or beauty, and generally of protecting existing amenities whether in urban or rural portions of the area." As was pointed out by the Lord Chief

Justice in the Divisional Court, those words are extremely wide. It is a legislative permission to make a scheme with the general object of controlling the development of the land comprised in the area to which the scheme applies. The word "development" is defined by s. 53 as including "any building operations or rebuilding operations, and any use of the land or any building thereon for a purpose which is different from the purpose for which the land or building was last being used." This particular land and building was being used as a garage before it was converted into a fun fair. If the enabling provisions of the Act had finished there, I cannot entertain any doubt that the restriction proposed to be imposed in this case would have fallen within the words "general object of controlling the development of the land." It seems to me that you can control user of land just as much by prohibiting a particular user as by saying: "It shall only be used in a certain way in certain conditions," or by saying: "It shall not be used for a particular purpose without the consent of the authority." It is a pure matter of English. To prohibit use without consent is a manner of controlling development, just as much as an absolute prohibition. The next section to which I need refer is s. 10, and I refer to this more or less in parenthesis. Under s. 10, the appellant could, if he had liked to do so, have applied under what is known as the "Interim Development Order" made by the Minister, for the necessary permission to use his property as a fun fair and, if permission had been refused by the local authority, he could have appealed to the Minister under s. 10, sub-s. 5, of the Act of 1932. That he did not do and his not having done that brought the powers of sub-s. 5 of s. 5, of the Act of 1943 into operation. I need not say anything more about that.

Sections 11 and 12, to which I am about to refer, come under the rubric: "Contents and effects of Schemes." Section 11, sub-s. 1, lays down certain obligatory provisions which must be contained in a scheme. It is as follows: "Every scheme shall define the area to which it applies, and specify, in accordance with the provisions of the next succeeding subsection, the authority or authorities who are to be responsible for enforcing and carrying into effect the provisions of the scheme, and (a) shall contain such provisions as are necessary or expedient for prohibiting or regulating the development of land" Clause (b) provides for certain matters which are not relevant to this appeal. Thus

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it is compulsory for a scheme to contain such provisions as are necessary or expedient for prohibiting or regulating the development of land. Then sub-s. 2 empowers the scheme to provide who shall be the responsible authority, as it is called for the purposes of the scheme. Sub-section 3 I need not read. In s. 12, sub-s. 1, come certain provisions which may be inserted in a scheme. It will be observed that it is permissive and not obligatory, and they are already covered by the general language of s. 1, and s. 11, sub-s. 1 (a), as it seems to me. But the legislature has thought it desirable, as so frequently happens in legislation, to specify expressly certain matters to which it desires to call attention. It is as though the section had started with the words: "Without prejudice to the generality of the provisions of s. 1 and s. 11, sub-s. 1, a scheme may provide for the following matters." Among these are, and they are obviously covered by the earlier general words "prescribing the space about buildings"—"limiting the number of buildings"—and then (d) "imposing restrictions upon the manner in which buildings may be used"—" (e) prohibiting building operations, or regulating such operations in respect of matters other than those specified in this sub-section." If that had been all that this sub-section provided for, the principal argument for the appellant would have been denied him. Confronted with the difficulty that the general words are in their ordinary meaning sufficient to make legitimate the present proposal, he quite naturally and properly seeks in the Act for a context which will be sufficient to cut them down, and that context he purports to find principally in s. 12, sub-s. 1 (c). That paragraph says that the scheme may include provisions "regulating, or enabling the responsible authority to regulate, the size, height, design and external appearance of buildings." It is pointed out that the legislature there appears to be drawing a distinction between "regulating" and "enabling the responsible authority to regulate," and from that it is said that, except in cases where the Act specifically allows a provision to be inserted in a scheme enabling the responsible authority to regulate, as distinct from regulating, the scheme must lay down once and for all the regulations or restrictions to which the owners of land in the area are to be subjected; in other words, it is said that this means that the scheme must have a final and defined set of regulations to which anyone can go and see exactly what he may and what he may not do, and that it is

not legitimate to insert in the scheme something which enables the local authority in its discretion at some future date to say whether or not, and to what extent, and where and by whom, a particular regulation shall or shall not be observed. It seems to me impossible to extract from this phrase any such elaborate restriction on the general words of the Act. It is to be observed that the subject-matter with which para. (c) deals is not the particular subject-matter with which we are concerned. The only words relevant to that subject-matter in this sub-section are the words in para. (d) "imposing" restrictions upon the manner in which buildings may be "used"; and a restriction saying that a building may not be used for a particular purpose without consent, I should have thought, falls clearly within the words "imposing restrictions."

Is it legitimate, according to proper principles of construction, to extract from the phrase "regulating, or enabling the responsible authority to regulate" some limitation upon the *prima facie* broad general meaning of the words "imposing restrictions"? I do not think that it is. It is said: "What can have been the object of the legislature in putting in those words 'or enabling the responsible authority to regulate,' if it was always possible to achieve the same result merely by the word 'regulating'?" It is not always possible to give a satisfactory answer to a question of that kind, but I can see an answer which seems to me to be a reasonable and satisfactory reason for putting in that distinction. Precisely the same phrase appears in s. 19, sub-s. 1, of the Act. That is a sub-section dealing with the question of compensation and enabling compensation to be excluded in certain classes of case. One class of case is the provision in a scheme which "regulates, or empowers the responsible authority to regulate, the size, height, design or external appearance of buildings." That is merely repeating what is provided for by s. 12, sub-s. 1 (c). But in para. (h) of sub-s. 1 of s. 19, another case is referred to, namely, a provision in a scheme which "in the interests of safety regulates or empowers the responsible authority to regulate the height and position of proposed walls, fences or hedges near the corners or bends of roads." I need not read any more. There are two observations which arise out of that provision: First, there is nowhere in the Act in express terms given a power to insert a provision which empowers the responsible authority to regulate the height and position of walls, fences or hedges unless it is to be found in the

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general words. A wall might be called a "building" under s. 12, sub-s. 1 (c), but a fence or hedge, and certainly a hedge, cannot. Therefore, as this paragraph clearly contemplates that a scheme may give power to regulate the height of a hedge, that power is only to be found in the general provisions of the Act to which I have referred. That is the first point. The second point very likely explains why the legislature put in that particular provision relating to empowering the regulation of these matters: When para. (h) of sub-s. 1, of s. 19, is looked at and the provisions of s. 12, sub-s. 1 (c) as to size, height, design and external appearance of buildings, are looked at, they have this common characteristic, as it seems to me, that each particular case has got to be dealt with according to its own particular circumstances. There is the height of a building dependent upon its own particular circumstances, its location, its relation to the other buildings near it and the breadth of the road, and so forth; the height of the fence or hedge at the corner of the road dependent on the measure of visibility at that particular corner, and whether or not the corner is a right angle or a curve. Anyhow, in both those classes of case a particular direction or restriction with regard to a particular matter would be required, and the legislature, as it appears to me, thought it desirable to make it clear beyond possibility of doubt that in the class of case, which is not susceptible of a general provision, the local authority should be given express power to deal with it. Whether that be the true explanation in the mind of Parliament or not, I cannot find in those words a sufficient indication to justify me in cutting down the generality of the governing words, particularly when, as I have said, under para. (h) it is clearly contemplated that there may be power to regulate the height of fences or hedges. That is the main objection that is raised.

I should refer to one point which comes out in the judgment of the Lord Chief Justice, and I do so because with all respect, although agreeing entirely with his conclusions, I do not find it possible to accept his particular explanation for the insertion of the words in s. 12, sub-s. 1, "enabling the responsible authority to regulate." He points out that in that case there are special provisions for appeal laid down in the sub-section. But, as a matter of fact, that particular procedure does not go as far as the learned Lord Chief Justice thought, for the reason that it does not apply to all the matters in that sub-clause,

namely, size, height, design and external appearance, but only to two of them, design and external appearance. Therefore, I cannot, with all respect, quite follow the reasoning of the Lord Chief Justice there. I think he perhaps failed to have pointed out to him the circumstance that the particular procedure did not apply to the whole of that particular provision.

There are two other matters to which I must refer on the construction of the Act. First, it was said that such a provision as is proposed in the council's scheme would give rise to certain inconveniences in the matter of compensation. It was pointed out that a person whose land is absolutely restricted can show what injury he has suffered by way of depreciation of his property. But a person on whom a restriction falls, which is capable of being lifted by a consent given by the authority, is in a much more difficult position because it may be extremely difficult to evaluate the depreciation of his property. To a certain extent every restriction, even if it can be lifted under some dispensing power, depreciates technically, at any rate, the value of property. If you own a dwelling-house, to be told you must not use it as a fun fair without the consent of the local authority is a restriction which theoretically, at any rate, depreciates its value. If, on the other hand, it is a building that could conveniently be used as a fun fair, the depreciation may be greater. On the other hand, the depreciation in such a case may be very great indeed if an application has been made and refused, and will be nil if the application is in fact granted. It is said: "What is the landowner to do and how is he to get his compensation fixed?" I do not feel very much difficulty about that. The precise quantification of the amount of depreciation in value of land is a matter for experts, and they are quite capable in reference to the circumstances of each particular case, I should have thought, to put a figure upon it. In any case, a man who wants to use his property as a fun fair, or thinks he would like to in the near future, can easily discover what his position is by applying for permission and seeing whether he gets it or not. Any inconveniences that may arise are not sufficient to cut down the broad general words of the Act. The other matter that is relied upon particularly is the absence of any right of appeal against a refusal of permission by the local authority to use as a fun fair. It is said that when the scheme comes to be made, there

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is no obligation under the statute either on the authority or on the Minister to make provision for an appeal from a refusal by the local authority. That is perfectly true. I think that when the Lord Chief Justice said there is a right of appeal to the Minister against the withholding of the consent, what he was thinking of was the probability and virtual certainty, as was conceded by counsel for the appellant, that either the authority will provide a right of appeal in the scheme or the Minister will insist upon its insertion. But it is pointed out, and I think correctly pointed out, that neither the authority nor the Minister is bound to insert any provision for an appeal and that has appeared to me the most weighty argument that has been brought forward by the appellant. The scheme of the Act and the policy of the Act, so far as one can see, is to provide at most important points, at any rate, for a right of appeal from decisions of the authority under these Acts. The right of appeal is very jealously guarded and provided for. In this case there is no obligation to do so. But, there again, although that is not unimportant, it is, in my judgment, quite insufficient to enable us to read into the general language of the Act some such limitation as has been suggested by the appellant.

There are certain other passages in the Act on which counsel for the council relied as indicating that in the contemplation of Parliament there could be power to impose restrictions of this character which could be lifted at the discretion of the local authority. I need not go through them; they do tend to support, I think, the view which I have expressed, but I do not find it necessary to rely upon them. My opinion in this case is based on the broad consideration that Parliament has chosen to use language comprehensive enough to include a provision of this kind, and has not indicated expressly or impliedly any intention that that language should be cut down in the manner for which the appellant contends. It was said that some restriction ought to be read into the language of the Act prohibiting this particular provision on some principle of what is called reasonableness and that a delegated power such as this must be used reasonably rather on the same principle as the power to make a by-law. In my judgment, the analogy of the by-law, even if it could carry the appellant as far as suggested, is quite out of place in the present circumstances. We are dealing with a totally different class of subject-matter and one in which the ultimate arbiter is the

Minister himself. In my judgment, not only does the argument of unreasonableness break down on the facts, but the attempt made is to introduce it into a subject-matter for which it was never designed.

In my opinion, the decision of the Divisional Court was quite right and the appeal must be dismissed with costs.

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WROTTESLEY L.J.: I agree that the appeal should be dismissed with costs and for the reasons given by the Master of the Rolls. As to the last matter, if what is sought to be introduced under the heading of reasonableness is that the use of the power must be reasonable in the opinion of judges of the High Court, I think that argument is not well founded.

LYNSKEY J.: I agree.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker, Baker; Sharpe, Pritchard & Co., for J. G. Drew, Town Clerk, Brighton.*

H. C. G.

PERRINS v. PYE.

1947

May 2.

Juries—Qualification of jurors—“Householder rated on a value of not less than 20l.”—Householder occupying lock-up shop in same district—Values not to be aggregated—Juries Act, 1825 (6 Geo. 4, c. 50), s. 1.

Lord Goddard
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The words “who being a householder shall be rated on a value of not less than 20l.” in s. 1 of the Juries Act, 1825, which sets out the qualification for a juror, mean a householder who is rated on that value in respect of the house of which he is a householder.

Where, therefore, a person occupied a flat of the net annual value of less than 20l. as a householder and also a separate lock-up shop in the same district of the net annual value of 48l.,

Held, that for the purpose of determining that person's qualification for jury service the net annual values of the two properties ought not to be aggregated and that she was not liable for jury service.

CASE STATED by justices.

A complaint was preferred before the justices at Southport by the respondent on the ground that she had been marked as a juror, whereas by reason that she was a householder rated in

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respect of premises at Southport the annual value of which was less than 20*l.*, namely, 19*l.*, she ought not to have been so marked. She complained that she had applied to the registration officer to have the mark removed from her name, but that he had refused to do so. She accordingly applied to the justices for a declaration that she ought not to be marked as a juror, in pursuance of s. 1, sub-ss. 4 and 5, of the Juries Act, 1922, and s. 11, sub-s. 2, of the Elections and Jurors Act, 1945.

At the hearing of the complaint the following facts were proved or admitted. The respondent's premises at 26A, Liverpool Road, in which she resided, were a self-contained flat. She was also the rated occupier of a separate lock-up shop at No. 28 in the same street, the net annual value of which was 48*l.* She owned or occupied no other premises in Southport. She had been marked as a person liable to serve on juries in respect of her electoral registration for No. 26A, Liverpool Road.

It was contended for the registration officer that in order to qualify for jury service a registered elector must, inter alia, (a) be a householder, and (b) be rated in respect of premises the net annual value of which was not less than 20*l.*; that if a registered elector was a householder in a county borough the several net annual values of all the properties in the same county borough of which he was the rated occupier should be aggregated for the purpose of calculating the qualifying net annual value; and that, having regard to the sum of the net annual values of Nos. 26A and 28, Liverpool Road, the respondent was not entitled to removal of the jury mark from her name.

It was contended for the respondent that in order to qualify for jury service a registered elector must, inter alia, be a householder residing in premises the net annual value of which was not less than 20*l.*, and that, as the only premises in Southport of which she was a householder had a net annual value of less than 20*l.*, her application to have the jury mark removed should be allowed.

The justices were of opinion that the respondent was not qualified for or liable to jury service because she was not a householder of premises the net annual value of which was not less than 20*l.*, so that the mark should be removed from her name. At the appellant's request, however, they stated this case for the opinion of the High Court.

Vernon Gattie for the appellant. The question whether the

respondent is liable for jury service depends on the interpretation of s. 1 of the Juries Act, 1825 (1). That section says "who, being a householder, shall be rated." It does not say rated in respect only of the house in which he is residing. In Halsbury's Laws of England, 2nd ed., vol. 19, p. 283, it is stated that "householders residing in premises the net annual value "of which, etc.," are compellable to serve as jurors, thus implying that it is only the value of the premises in which the householder is residing that is to be taken into account. The contrary opinion is expressed in Mackenzie's Overseers Handbook and Warner Terry's Representation of the People Acts and the present practice generally is to aggregate the values of all properties occupied by the householder in the same district.

Squibb for the respondent referred to the Elections and Jurors Act, 1945, s. 11, sub-s. 4. [He was stopped.]

LORD GODDARD C.J. This case raises a point which does not seem to have been the subject hitherto of a decision. The respondent, whose name was marked as a juror and put into the jury book, satisfied the magistrates that she was a householder and was rated and assessed in respect of the house in which she lived, in the borough of Southport, at 19*l*. She was therefore occupying a house the value of which was less than the qualification, which is 20*l*. The registration officer's contention was that as she occupied also a lock-up shop in Southport which was rated at 48*l*., her total assessment to the poor rate in Southport was more than 20*l*. The question is whether or not in assessing qualification the registration officer

(1) Juries Act, 1825, s. 1: "Every man, except as hereinafter excepted, between the ages of twenty-one years and sixty years . . . who being a householder shall be rated or assessed to the poor rate, or to the inhabited house duty in the county of Middlesex, on a value of not less than 30<i>l</i>., or in any other county on a value of not less than 20<i>l</i>. or who shall occupy a house containing not less than fifteen windows, shall be qualified and shall be liable to serve on juries . . ." Juries Act, 1870, s. 6 :	"Every man whose name shall be in the jurors book for any county in England or Wales . . . and who shall occupy a private dwelling-house rated or assessed to the poor rate or to the inhabited house duty on a value of not less than 100<i>l</i>. . . . or who shall occupy premises other than a farm rated or assessed as aforesaid on a value of not less than 100<i>l</i>., or a farm rated or assessed as aforesaid on a value of not less than 300<i>l</i>., shall be qualified and liable to serve on special juries. . . ."
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was entitled to aggregate those two properties. In my opinion, he was clearly not so entitled. I think s. 1 of the Juries Act, 1825, fairly read, refers to a householder who is rated or assessed in respect of the house of which he or she is a householder.

My reading of the Act is fortified, I think, by the Juries Act, 1870, s. 6 of which sets out the qualification of special jurors, and provides first of all that they have to be in the jurors book and then, being in the jurors' book, that they must occupy premises in the district of the value of 100*l.* or possess one of the other qualifications set out in that section. It seems to me that that goes to show that when Parliament means to take into account something more than the house in which the householder lives, it says so in clear terms. I think, therefore, that under s. 1 of the Juries Act, 1825, the qualification must be the rateable value of the house of which the person whose name is in the jurors' book is the holder. For these reasons, in my opinion, the magistrates came to a right decision in point of law, and this appeal fails.

ATKINSON J. I agree. I think the meaning of the words in the relevant section is not open to doubt. In my opinion those words mean "who being a householder shall be rated or assessed "to the poor rate as such," and if that is right, the appeal must fail.

OLIVER J. I agree. I think the only possible way of reading the words "who being a householder shall be rated," is "rated "in respect of the house he holds," for the later words make liable and cover a person occupying a house containing not less than fifteen windows. For these reasons and those given by my Lord, I agree that the appeal fails.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for R. Edgar Perrins, Town Clerk, Southport.*

Solicitors for respondent: *Walbrook & Hosken, for Brighthouse, Jones & Co., Southport.*

H. A. P.

HENDON BOROUGH COUNCIL v. STANGER.

1947

May 1.

Town planning—Residential zone—Prohibition of industrial building—Factory—Premises used for making and testing concrete—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), s. 151.

Lord Goddard
C.J.,
Atkinson and
Oliver JJ.

The respondent, a consulting engineer, conducted processes for the testing of concrete in premises occupied by him. The concrete was first mixed in a laboratory mixing machine driven by electric power and was then moulded into blocks which, when dry, were subjected to pressure in another machine with a view to testing the strength and suitability of the concrete for building and other processes. Persons in manual labour were employed in the work which was conducted for purposes of gain in the course of the respondent's profession. The respondents' premises were situated in a residential zone delineated in a town planning scheme which prohibited the use of buildings as industrial buildings in such a zone and provided that "industrial building" in the scheme should be construed by reference to the definition of "factory" in s. 151 of the Factories Act, 1937. On an appeal by the town planning authority from the decision of justices that the respondent's premises were not an industrial building within the meaning of the scheme:—

Held, that the respondent's premises were premises in which persons were employed in manual labour in a process incidental to the making of an article and also to the breaking up or demolition of an article for purposes of gain and were, therefore, a factory within the meaning of s. 151 of the Factories Act, 1937, and consequently an industrial building within the terms of the town planning scheme.

CASE STATED by Middlesex justices.

Pursuant to the provisions of the Town and Country Planning 1932, the appellants, the Hendon Borough Council, as the responsible authority under the Act, made a scheme known as the Hendon Planning Scheme, No. 1, in respect of certain land within their district. The scheme provided for the division of the land into residential and industrial zones and prohibited buildings in a residential zone from being used as industrial buildings within the meaning of the scheme. Clause 26 of the scheme provided that the term "industrial building" was to be construed by reference to the Factory and Workshops Acts, 1901 to 1929, which it was agreed included a reference to s. 151 of the Factories Act, 1937 (1). The scheme came into force on

(1) Factories Act, 1937, s. 151: "means any premises in which
" Subject to the provisions of this " . . . persons are employed in
" section, the expression 'factory' " manual labour in any process

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August 29, 1936, and in November, 1945, the respondent, R. H. H. Stanger, entered into occupation of certain buildings known as Summerfield House, Barnet Lane, Elstree, Herts. which were situated in a residential zone under the scheme. The respondent was an associate member of the Institution of Civil Engineers and, in partnership with his son, practised as a consulting engineer specializing in the chemical and physical testing of materials used in building and engineering construction. He had adapted the premises at Summerfield House for use as chemical and testing laboratories, and, among the processes carried on by him in the building, was the testing of materials used in the making of concrete. For the purpose of making a test, concrete was mixed in a machine six feet six inches high and three feet wide, which was driven by an electric motor, such machine being a laboratory concrete mixer which would be of no use to a builder. The sample of concrete was then moulded into six inch cubes which, after being allowed to set hard, were placed one at a time in a pressing machine and subjected to pressure until the block was crushed. The crushing machine which was twelve feet high by four feet square and was operated by an electric motor driving an oil pump, was a piece of scientific apparatus, designed for making tests. The respondent employed persons in manual labour in the processes he conducted and the information obtained from them was supplied for purposes of gain by the respondent in conducting his profession of a consulting engineer. On October, 1946, the appellants gave the respondent a notice that they proposed to prohibit the buildings occupied by him from being used as an industrial building within the meaning of the Hendon Planning Scheme. On November 12, 1946, the respondent, pursuant to the provisions of s. 13, sub-s. 4, of the Town and Country Planning Act, 1932, preferred a complaint before a court of summary jurisdiction against the appellants by way of appeal against the notice served on him.

It was contended before the justices on behalf of the respondent that the buildings occupied by him were not used as a

"for or incidental to any of the
"following purposes, namely:—
"(a) the making of any article or
"part of any article; or (b) the
"altering, repairing, ornamenting,
"finishing, cleaning, or washing,
"or the breaking up or demolition
"of any article; or (c) the adapt-

"ing for sale of any article; being
"premises in which, ... the
"work is carried on by way of
"trade or for purposes of gain
"and to or over which the em-
"ployer of the persons employed
"therein has the right of access
"or control"

factory within the meaning of s. 151 of the Factories Act, 1937, and, consequently were not used as an industrial building within the meaning of cl. 26 of the scheme. The contrary was contended on behalf of the appellants. The justices were of opinion that the respondents' buildings were not used as an industrial building as defined in cl. 26 of the scheme and allowed the appeal. The appellants appealed.

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Rowe K.C. and *Squibb* for the appellants. The justices were wrong in holding that the respondent's premises were not a factory within the meaning of s. 151 of the Factories Act, 1937 and consequently an industrial building within the town planning scheme. The case is clearly covered by the words of s. 151, sub-s. 1, of the Act of 1937, since the respondent employed on the premises persons in manual labour in a process for or incidental both to the making of an article and also to the breaking-up or demolition of an article, and carried on such work for purposes of gain. The fact that the article is only made for testing purposes does not prevent it from being an article within the meaning of s. 151. The word "purpose" in the section does not refer to the purpose of the proprietor of the business, it is the actual use to which the hereditament itself is put that has to be considered and not the use to be made of the products of the hereditament or of the work carried on there: *Moon v. London County Council* (1). Here the pieces of concrete were made at the respondent's premises and the fact that they were made for the purpose of testing them only, is quite immaterial. Machines were used on the premises for making or demolishing articles and the persons employed there would be entitled to the protection afforded by the Factories Acts.

Hill for the respondent. The decision of the justices was right and the respondent's premises were not a factory within the meaning of s. 151. The principle applicable is to be deduced from *Wood v. London County Council* (2), where it was said that where the making of an article is not an end in itself but is simply incidental or ancillary to something which is not a factory purpose, the making of that article does not constitute the premises on which it is made a factory. Further, the respondent here was not making an article within the meaning of the section but was merely testing blocks of concrete. In *Grove v. Lloyds British Testing Company* (3) which was concerned

(1) [1931] A. C. 151.

(3) [1931] A. C. 466.

(2) [1941] 2 K. B. 232.

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with the process of the testing of cables and anchors, which process, it was said, constituted the premises where the tests were made an industrial hereditament, Lord Dunedin said : " testing does not in any way make the article different as an " article from what it was before. It only proclaims its " character. The insertion of the link which is necessary to " rejoin the cable after the links have been cut out " (for the purpose of testing their strength) " is . . . obviously only " incidental to the purpose of testing." In the present case, the real purpose of the respondent is the testing of certain materials and though he makes concrete his manufacturing of it is not really for the purpose of making it, but is merely incidental and, therefore, is not within the section.

LORD GODDARD C.J. [stated the facts and continued] : This is not an easy case and it is one, I think, on which different minds might take different views. Speaking for myself I do not think that in a case of this sort dealing with town planning matters, the court ought to be astute to find that a building in which something is undoubtedly being made and turned out by machinery, is not an industrial building. The object of the scheme is to separate industrial from residential buildings. We are not concerned in this case with the question whether a nuisance has been caused or not, but when one finds on premises machinery of the kind used in the present case, not the small sort of machine that an amateur carpenter might have to drive a little lathe, but big and substantial machines driven by electric motors, which, in their turn are driven by oil pumps, and when, in addition, there are employees on the premises, the place has all the appearance, whatever the outside of the house may look like, of being an industrial concern, although the primary purpose for which the respondent is making concrete there, is that of testing. The whole question in the case is whether the premises are a factory within the meaning of s. 151 of the Factories Act, 1937, and the only part of the section that we have to construe is the first part of the first sub-section. [His Lordship read the sub-section and continued :] There is no dispute that the work on the premises is carried on for purposes of gain, nor is it in dispute that persons are employed in manual labour and that some of them, at any rate, are making concrete. I cannot bring myself to say that concrete is not an article. There was on the premises a concrete mixer. Most people are familiar with the concrete mixers one sees from

time to time in the streets and no one supposes that the concrete mixer on the respondent's premises was such a formidable piece of machinery as that. It was, in fact, found to be a laboratory machine, but it is none the less making concrete. The object of making it is this: builders and contractors wish to know whether the materials they propose to use in a particular building or undertaking will be satisfactory for the purpose of being used as concrete. They send the materials to the respondent for a report and one way he adopts of finding out whether the materials are satisfactory or not is to make from them that which the materials are designed to make. No doubt he only makes concrete in small quantities, what quantity we are not told, but I cannot say that he is not making an article, because concrete is an article just as much as a brick is an article. If the respondent is making an article and his workmen are employed in making that article, then, quite apart from the fact that he is making it by a machine, it seems to me that the premises come within the definition of a factory in s. 151. A further point is that having made the concrete, he then by means of another machine of considerable size, proceeds to break up the article which he has made. He does this, I suppose, to discover what amount of force has to be used to break up this particular piece of concrete. It seems to me, therefore, that the respondent is also engaging in a process in which he employs manual labour in "the breaking up or demolition of any article" such article being not only the concrete itself, but the concrete cube which he has made. In the circumstances I think it follows that we are bound to hold that these premises are a factory and therefore an industrial building. I am supported in this view by the fact that the purpose for which the premises are used is in no sense residential. It is contrary to the atmosphere of residential premises to carry on a trade in them which involves the mixing of concrete, and it does not appear to me to matter for what purpose the concrete may be used. I think the council were entitled to say that these were not residential but industrial premises and that they were consequently entitled to serve a notice on the respondent prohibiting their use as such.

ATKINSON J. I agree, although I must confess, with some hesitation. I agree with Mr. Hill that we must look at the wording of s. 151 of the Factories Act, 1937, very carefully. As I understand Mr. Hill's argument it is that everything is

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governed by the real purpose of that which is going on at the supposed factory. The words of the section are "employed" in manual labour in any process for or incidental to any of the "following purposes, namely" It is not right, he says, to stop at the word "process" and say "there is a process" which is of a manufacturing character." That is not enough. It is necessary, he continues, to see if the process is incidental to a purpose which comes within (a), (b) or (c). He argues that the real purpose in the present case is the testing of certain materials, and that although such testing involves a process which is a manufacturing process, viz., the making of concrete, the manufacturing is not really for the purpose of making concrete, but is merely incidental to the operation of testing, and, therefore, does not come within the section. I think there is a good deal of force in that argument but I can see no reason why we should give a very narrow interpretation to the words of the section. The process complained of is a process which, in fact, is the making of concrete, and concrete in the particular form of briquettes. It is difficult to say they are not articles, and therefore, there is something manufactured, although it may not be wanted for its own sake but only for the ultimate purpose of testing. Then, when it has been manufactured, the respondent proceeds to demolish and break it up. I am satisfied that it is not enough to say that the ultimate purpose of all that is done is merely a testing purpose and that, therefore, the process is not one that falls within the section. It seems to me that it is sufficient if it be established, as it was in this case, that the process in question involved the making of something and the destruction of something. It would be contrary to the whole spirit of the section if it were to be held that a person was to be entitled to carry on operations of that kind in a residential area. I have, therefore, come to the conclusion that the view expressed by my Lord is the true one and that the appeal must be allowed.

OLIVER J. I agree.

Appeal allowed.

Solicitor for the appellants : *Leonard Worden.*

Solicitors for the respondent : *Coward, Chance & Co.*

P. B. D.

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Mar. 26, 27,

28;

Apr. 1, 2.

Cassels J.

Police—Discipline—Power of dismissal—Police inspector convicted of theft—Procedural requirements of regulations not complied with—Validity of dismissal—Appeal to Home Secretary—Order directing reinstatement in rank of constable—Jurisdiction of Home Secretary—Waiver of right to sue—Limitation of action against public authority—Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 5—Police (Appeals) Act, 1927 (17 & 18 Geo. 5, c. 19), s. 2, sub-s. 2—Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 21—Police Regulations, 1920 (St. R. & O. 1920, No. 1484).

The plaintiff in 1942, when an inspector of the Metropolitan Police, was charged with theft and was suspended from duty from September 24 of that year. On October 7 he pleaded guilty to three charges of theft at a police court and was sentenced to one month's imprisonment. On October 8 he was dismissed from the force by the commissioner. Later he appealed to the Home Secretary and in April, 1943, he received a letter from the Home Office stating that the Home Secretary had decided to allow his appeal and enclosing a copy of an order made by the Home Secretary which directed that the plaintiff should be reinstated in the rank of police constable and that the period from September 24 to the date of the order should reckon for pension. On April 12, 1943, the plaintiff was reinstated accordingly in the rank of police constable. On March 28, 1946, he commenced an action against the then Commissioner of Police claiming a declaration that he was entitled to hold the rank of inspector with the emoluments of that rank as from September 24, 1942, on the grounds (1.) that his dismissal was invalid because the procedure prescribed by the Police Regulations and the General Orders of the Force had not been complied with, and (2.) that the Home Secretary exceeded his jurisdiction under the Police (Appeals) Act, 1927, because he purported to allow the appeal and vary the punishment, whereas under s. 2, sub-s. 2, of that Act he only had power either (a) to allow the appeal or (b) to dismiss the appeal, or (c) to vary the punishment:—

Held, that the commissioner had power under the Metropolitan Police Act, 1829, to dismiss the plaintiff on the ground that he was unfit for his duty without complying with the requirements of the regulations or orders relating to ordinary matters of discipline and that therefore the plaintiff was regularly and legally dismissed.

Kilduff v. Wilson (1938) 160 R. T. 103 and *Noakes v. Smith* (1942) 107 J. P. 101 followed.

Held, also, that the Home Secretary did not exceed his jurisdiction because the order made by him did not purport to allow the appeal, but only to vary the punishment, and the mere statement by an official of the Home Office that the Home Secretary had decided to allow the appeal did not invalidate the order.

Held, further, that the plaintiff had waived his right to take

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these proceedings by appealing to the Home Secretary and acting on his decision for three years before bringing his action and that in any event his action was barred by s. 21 of the Limitation Act, 1939.

ACTION.

The plaintiff joined the Metropolitan Police Force in 1922. He was promoted to sergeant in 1931, to station sergeant in 1933 and to inspector in 1939. In 1942, three charges of theft were brought against him, namely, stealing six pieces of glass mirror from a building which had been damaged by enemy action and stealing a leather purse and a trilby hat which were lost property and had been entrusted to him as a police officer. He was suspended from duty on September 24, 1942, and on October 7 he appeared at the Lambeth Police Court where he pleaded guilty to all the charges and was sentenced to one month's imprisonment. On October 8, 1942, he was dismissed from the force by the commissioner. On his discharge from prison he obtained civilian employment, but on December 2, 1942, he wrote a letter to the commissioner with a view to obtaining reinstatement in the metropolitan police force. The commissioner assisted him to present an appeal to the Home Secretary and the Home Secretary, having considered the appeal, made an order, dated March 30, 1943, directing that the plaintiff should be reinstated in the force in the rank of police constable with pay at 90s. a week and that the period from September 24, 1942, to the date of the order should reckon for pension. By a letter, dated April 1, 1943, from the Home Office signed by Mrs. J. Hart, the plaintiff was informed that the Secretary of State had decided to allow his appeal and a copy of the order made by the Home Secretary was enclosed therewith. The plaintiff was reinstated in the metropolitan police force on April 12, 1943, in the rank of police constable.

On March 28, 1946, the plaintiff commenced the present action against the commissioner of police claiming a declaration that he was entitled to hold the rank of inspector and to have the privileges and emoluments of that rank as from September 24, 1942. The claim was based on the grounds (1.) that the requirements of the Police Act, 1919, the regulations made under s. 4 of that Act and the General Orders of the Metropolitan Police Force had not been complied with in that he was not informed in writing on a misconduct form of the charge against him or supplied with copies of the reports on which the charge was founded, that he was not

invited to give his explanation in writing or given an opportunity of putting forward his explanation personally, and that no disciplinary board was held ; and (2.) that in directing his reinstatement in the rank of police constable the Home Secretary exceeded his jurisdiction under the Police (Appeals) Act, 1927, s. 2, sub-s. 2 (1), since he purported both to allow the appeal and to vary the punishment.

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Scott Cairns for the plaintiff. The plaintiff was not properly dismissed from the metropolitan police force because the regulations were not complied with. The rules for dealing with offences against discipline are contained in the Police Regulations, 1920, made under s. 4 of the Police Act, 1919, and in the General Orders of the Force. The power of dismissal which is exercisable by the commissioner is derived from the Metropolitan Police Act, 1829. It is admitted that that Act cannot be regarded as repealed by the Police Act, 1919, and the regulations made thereunder (see *Wallwork v. Fielding* (2)), but those regulations do show the way in which the commissioner is to exercise his powers. There are not two separate codes under which dismissal may take place (1.) by the act of the commissioner, and (2.) under the regulations ; but there is only one power of dismissal the exercise of which is governed by the regulations. In *Cooper v. Wilson* (3), where a police officer was dismissed from a borough police force under the power contained in s. 191 of the Municipal Corporations Act, 1882, Greer L.J. said : " These observations seem to me to show that " the power to make regulations under s. 4, sub-s. 1, of the " Police Act, 1919, does not impliedly repeal s. 191, sub-s. 4, " of the Act of 1882. The regulations, in my judgment, " must be read as applying to the way in which the watch " committee are to exercise their powers in a borough, and to the " way in which the chief constable is to exercise his similar " powers in a county." Where a police officer has been improperly dismissed he can apply to the court for a declaration that such dismissal is invalid : see per Greer L.J. in *Cooper v. Wilson* (4).

(1) Police (Appeals) Act, 1927, s. 2, sub-s. 2 : " The Secretary of " State after considering the notice " of appeal . . . shall by order " either—(a) allow the appeal ; " or (b) dismiss the appeal ; or " (c) vary the punishment by

" substituting some other punish-
" ment which the disciplinary
" authority might have awarded
" "

(2) [1922] 2 K. B. 66.

(3) [1937] 2 K. B. 309, 316.

(4) Ibid. 321.

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Even if the plaintiff was properly dismissed, the Home Secretary had no power to order his reinstatement in the rank of police constable. Under the Police (Appeals) Act, 1927, s. 2, sub-s. 2, the Home Secretary can do one of three things. He may either (a) allow the appeal, or (b) dismiss the appeal, or (c) vary the punishment. He cannot allow the appeal and vary the punishment, which is what he has purported to do here.

The granting of declarations is in the discretion of the court and in the present case that discretion should be exercised in favour of the plaintiff by granting the declaration which he seeks.

Sir Valentine Holmes K.C., Geoffrey Howard and Stabb for the defendant. The plaintiff's case is based on a complete fallacy, that the commissioner for the metropolitan police is bound to treat as a disciplinary matter a case which has already resulted in a police officer being convicted of a felony and sentenced to a term of imprisonment. If the plaintiff is right, any police officer who has served or is serving a sentence of imprisonment in similar circumstances might claim to be still a police officer entitled to pay and emoluments even while in prison. Approaching the case in the right way it is clear that s. 5 of the Metropolitan Police Act, 1829, which gives the commissioner power to suspend or dismiss any police officer whom he shall consider unfit to be a member of the force, is still the law to-day. Two attempts have been made unsuccessfully to persuade the court to decide that that provision or the similar provision in s. 191, sub-s. 4, of the Municipal Corporations Act, 1882, has been impliedly repealed by s. 4 of the Police Act, 1919, and the regulations made thereunder: see *Wallwork v. Fielding* (1) and *Cooper v. Wilson* (2). It is clear beyond doubt that neither of those provisions has been repealed. It has been suggested that nevertheless the regulations made under the Act of 1919 govern the way in which the commissioner must exercise his right to dismiss and compel him to go through a certain procedure. But in *Kilduff v. Wilson* (3), Tucker J. held that non-compliance with matters of procedure under the Police Regulations did not go to the root of the jurisdiction of the police authority and that the dismissal of the plaintiff in that case was valid, and his decision was upheld by the Court of Appeal. That case was followed in *Noakes v. Smith* (4).

(1) [1922] 2 K. B. 66.

(2) [1937] 2 K. B. 809, 316.

(3) (1938) 160 L. T. 103, 109, 110.

(4) (1942) 107 J. P. 101.

In any case any errors or omissions can be waived by the plaintiff and in the present case the plaintiff must be taken to have waived them by accepting the decision of the commissioner at the time, by appealing and by applying for reinstatement in accordance with the ruling of the Home Secretary on that appeal.

This action has been brought against the wrong defendant for the wrong remedy in the hope of escaping from the effect of s. 21 of the Limitation Act, 1939, which would bar his remedy as in *Cooper v. Wilson* (1). It is really an action in respect of a wrongful act alleged to have been committed by a public authority as long ago as October, 1942, and on that ground it should not be allowed to succeed.

In any event the grant of a declaration is in the discretion of the court, and the court ought not to exercise that discretion in favour of a plaintiff when there has been such a long delay as in this case or where the declaration asked for would lead to the absurd result that the plaintiff would be entitled to be paid as an inspector of police while in prison.

Scott Cairns replied.

Cur. adv. vult.

April 2. CASSELS J. The grounds upon which the plaintiff bases his claim are that the statutory requirements of the Police Act, 1919, and of the regulations made under s. 4 of that Act, and the requirements of the General Orders by which the metropolitan police are governed, have not been complied with. A further ground is that the Home Secretary exceeded his jurisdiction and powers under the Police Appeals Act, 1927, s. 2. I propose to deal with this latter point at once. The plaintiff received a communication from the Home Office, dated April 1, 1943, stating that the Secretary of State, after full consideration, had decided to allow the appeal, and enclosing a copy of the order made under s. 2 of the Act to which I have referred. When that order is examined, it shows that what the Secretary of State did was to vary the punishment. There is nothing in the order which says that he allowed the appeal. The plaintiff says that the Home Secretary could allow the appeal or dismiss the appeal or vary the punishment, but that he could not allow the appeal and vary the punishment because then he would be doing two things when he only had the power to do one; and, further, that if he really did allow the appeal, then he had no power to reinstate the plaintiff as a police constable, for the act of allowing the appeal auto-

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matically reinstated the plaintiff as an inspector. I must be guided by the order which was actually made, and not by what someone in the Home Office said that the Secretary of State did. The Home Secretary did not exceed his jurisdiction or powers. There is no substance in this point, and it fails.

The plaintiff also says that the action of the Home Secretary is of no consequence, because he varied a punishment which (says the plaintiff) the commissioner had no power to impose, because the commissioner had not complied with the requirements of the Police Act, 1919, and the regulations made thereunder, or the General Orders. I must therefore turn to a consideration of this contention. The plaintiff submits that he was dismissed without being informed in writing on a misconduct form of the charge against him, without being supplied with copies of the reports upon which the charge was founded, without being invited to give his explanation in writing or being given an opportunity of putting forward his explanation personally, and without a disciplinary board. None of the steps mentioned was taken. The commissioner just dismissed the plaintiff from the force, the reason being that the plaintiff was convicted at the Lambeth Police Court on October 7, 1942, of larceny, and sentenced to one month's imprisonment. Assuming that the commissioner had power to dismiss, it would certainly seem that he had grounds. The plaintiff's contention, however, is that the dismissal was a nullity because the commissioner did not take the step of bringing the plaintiff, or the matter, before a disciplinary board after the usual preliminaries.

By the Police Regulations, 1920, made by the Secretary of State under the Police Act, 1919, provision is made that in the case of the metropolitan police the procedure in discipline cases shall be as specially approved by the Secretary of State and published in the General Orders of that force. The police authority for the metropolitan police district is the Secretary of State himself: see Police Act, 1919, s. 12, and Police Act, 1890, sch. 3. As regards discipline and punishments, on such matters as supplying the accused officer with reports and giving him an opportunity of making his explanation and calling witnesses, the regulations in regard to the metropolis are substantially the same as they are elsewhere. Under the heading of "Liability to dismissal," para. 9 of s. 5 of those orders reads as follows: "An officer is liable to immediate dismissal " for unfitness, negligence or misconduct, independently of any " other punishment to which by law he may be subject. The

"commissioner may also remove him from the service by dismissal or otherwise without assigning any reason"; and the Disciplinary Code, No. 275, para. XVIII. reads: "Any member of the force also commits an offence against discipline, and shall be liable to punishment, if he is guilty of an offence which is punishable on conviction, whether summarily or on indictment."

The metropolitan police force has been in existence as a police force for a hundred and eighteen years. It began by reason of the passing of the Metropolitan Police Act, 1829. The police at that time were under justices. Section 5 of that Act provides: "The said justices may from time to time, subject to the approbation of one of His Majesty's principal Secretaries of State, frame such orders and regulations as they shall deem expedient, relative to the general government of the men to be appointed members of the police force under this Act . . . and the said justices may at any time suspend or dismiss from his employment any man belonging to the said police force whom they shall think remiss or negligent in the discharge of his duty, or otherwise unfit for the same." By the Police Act, 1839, s. 4, the justices were replaced by commissioners of police. By the Police Act, 1856, s. 1, the number of commissioners for the metropolitan police was reduced to one, and one it has remained ever since. Here, then, is a power of dismissal in the hands of the commissioner, without any reference to a disciplinary board and without any compliance with the requirements set forth in regard to what I may call an ordinary matter of discipline or breach of the Disciplinary Code.

The first defence to this action is that the commissioner had the power to do what he did. He came to the conclusion that the plaintiff, having been convicted and sentenced to a term of imprisonment, was unfit for the discharge of his duty. Section 5 of the Act of 1829 has not been repealed. In the case of a borough police force, where the watch committee is the police authority and the disciplinary authority, the power to suspend or dismiss is reserved by the Municipal Corporations Act, 1882, s. 191. This has not been repealed: see *Cooper v. Wilson* (1). That was a case of a dismissal by the watch committee of a police officer who had actually resigned before he was dismissed, and the Court of Appeal held that that was beyond the powers of the watch committee; but Greer L.J., said (2): "The power to make regulations under s. 4, sub-s. 1,

(1) [1937] 2 K. B. 309.

(2) Ibid. 316.

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" of the Police Act, 1919, does not impliedly repeal s. 191, " sub-s. 4, of the Act of 1882." In the case of county police, where the standing joint committee is the police authority and the Chief Constable is the disciplinary authority, the power to dismiss is contained in the County Police Act, 1839, s. 6. In the case of the City of London police, where the Common Council of the City of London is the police authority and the commissioner is the disciplinary authority, the power to dismiss is contained in a private Act intituled " The City of London " Police Act, 1939," s. 14. It will therefore be seen that throughout the country the statutory provision remains in force for the dismissal of an officer considered by the disciplinary authority to be unfit for the discharge of his duties.

Here, the commissioner acted under the powers which he has under the Act of 1829 and the General Orders. He is not obliged to put into operation the whole of the machinery in such a case. The plaintiff was considered by the commissioner to be unfit by reason of his conviction and imprisonment. That such a situation has to be dealt with by the commissioner is indicated by reg. No. 311 (i.), which reads: " If, during the " proceedings of any disciplinary board, facts emerge which " establish a prima facie criminal case, the board will forthwith " adjourn and seek the instructions of the commissioner." Then there is reg. No. 320 : " When an officer is convicted of " any criminal offence, the question of his retention in the " service will be referred to the commissioner." The contention of the plaintiff that his dismissal is a nullity because procedural requirements were not complied with does not prevail. I find that he was regularly and legally, and on good and proper grounds, dismissed. If it were otherwise discipline would be difficult to maintain. Splendid as the police force is, it is a fact that occasionally, though very rarely, a member of it is convicted of a criminal offence and sentenced to a term of imprisonment. It would amount almost to a farce to say that in such circumstances the commissioner was powerless to dismiss unless he had set in motion the procedure applicable to a case of insubordination. In this case the commissioner had the Act of 1829 and the General Orders to support him in his action.

Some cases in which the Police Regulations, 1920, were dealt with have been cited. In *Kilduff v. Wilson* (1), Tucker J. said : " I think that the breaches of these regulations or the " non-compliance with these regulations were merely procedural

" matters which did not go to the root of the jurisdiction of the " watch committee." In *Noakes v. Smith* (1), Lewis J. followed *Kilduff v. Wilson* (2), and held that the plaintiff, a police sergeant, failed to establish that an adverse decision of the watch committee was illegal, null and void, because he had not been ordered to appear before the chief officer of police in accordance with reg. 18.

My decision that the commissioner, in dismissing the plaintiff, acted regularly and legally, would conclude the matter in favour of the defendant ; but I think I ought to deal briefly with the other grounds which are raised. I think the plaintiff may be said to have waived his right to take these proceedings by appealing to the Home Secretary and accepting and acting upon his decision for three years. The writ was not issued until March 28, 1946.

The Limitation Act, 1939, s. 21, is also raised, the defendant, as commissioner, being a public authority charged with a public duty, and this action being in respect of something done in discharge of that public duty. The same defence was successful in *Coventry v. Wilson* (3), where it was held by Tucker J., and affirmed by Scott L.J. in the Court of Appeal, that an action founded on an alleged wrongful act more than a year earlier was barred. This action is in respect of acts done more than a year before the writ was issued, and I hold that the plaintiff's action was barred by the statute.

Declaratory judgments are in the discretion of the court. There has been considerable delay on the part of the plaintiff in bringing his proceedings. He was dismissed on October 8, 1942, and he started these proceedings, as I have said, on March 28, 1946, nearly three years after he was reinstated. On that ground alone I should not have been prepared to give a decision adverse to the plaintiff. I think I should have taken into consideration the circumstances of the war, and the fact that the plaintiff had to prepare his own case until he consulted solicitors in September, 1945.

In the circumstances there must be judgment for the defendant.

Judgment for defendant.

Solicitors for plaintiff : *Bolton, Jobson & Yate-Lee.*

Solicitor for defendant : *Solicitor to Metropolitan Police.*

(1) 107 J. P. 101.

(3) [1939] 1 All E. R. 429, 448.

(2) 160 L. T. 103.

H. A. P.

1947

April 23.

Lord Goddard
C.J.,
Atkinson and
Oliver JJ.

DENERLEY v. SPINK.

Pharmacy Acts—Chemist—Chain of shops owned by qualified chemist—One shop not under control of qualified assistant—Name over shop—"Spinks the Chemists"—Charge of unlawfully using a description calculated to suggest that he or someone employed in business possessed qualification other than he in fact possessed—Pharmacy and Poisons Act, 1933 (23 & 24 Geo. 5, c. 25), s. 3, sub-s. 2.

The respondent, who was a duly qualified and registered chemist owned eleven shops in various places, which were carried on under the name "Spinks the Chemists" which appeared on a large board above the shops. Qualified assistants were in control of ten of the shops, but in a shop at P. there was no qualified assistant owing to the shortage thereof. No medicines were dispensed at the P. branch nor were poisons sold there, but only packed medicines and surgical and medical preparations. A label "Spinks Chemists" was placed on the articles sold. A notice was exhibited in the window stating that no qualified assistant was in charge of the shop and that no medicines could be dispensed. The respondent was charged, under s. 3, sub-s. 2, of the Pharmacy and Poisons Act, 1933 with unlawfully using in connexion with his business at P. a description, namely, "chemists" reasonably calculated to suggest that he or someone employed in the business possessed a qualification other than the qualification which he in fact possessed.

Held, that the section could not be read as if it contained the words "he or any person in control of premises" where the business is carried on. The business belonged to Mr. Spink and he was a chemist and that was what the notice board represented, and no infringement of the section had been committed by him.

CASE STATED by justices for the East Riding of Yorkshire.

At a court of summary jurisdiction sitting at Pocklington, an information was preferred by the appellant Edward Denerley an inspector of the Pharmaceutical Society, under the Pharmacy and Poisons Act, 1933, s. 3, sub-s. 2, against the respondent, Arthur Leslie Spink, for that he trading as "Spinks the Chemists" on July 2, 1946, did unlawfully use in connexion with the business carried on at Market Place, Pocklington, a description—namely "Chemists"—reasonably calculated to suggest that he or someone employed in the business possessed a qualification with respect to the selling dispensing or compounding of drugs or poisons other than the qualification which he or they in fact possessed contrary to s. 3, sub-s. 2, of the Pharmacy and Poisons Act, 1933. (1).

(1) Pharmacy and Poisons Act, "connexion with any business 1933, s. 3, sub-s. 2 : " It shall not " any title, emblem or description " be lawful for a person to use in " reasonably calculated to suggest

On the hearing of the information on October 5, 1946, the following facts were proved or admitted. The respondent owned eleven chemists shops in various places including one at Pocklington which was carried on under the name "Spinks 'the Chemists'" which name or title appeared on a large board above the shop and also on a label attached to a substance purchased by the appellant. The respondent was himself a duly registered and qualified chemist and druggist. Qualified assistants were in control of ten of the respondent's shops, but there was no qualified assistant at the Pocklington shop owing to the shortage of such qualified assistants. The shop at the time was in the control of unqualified female assistants. No poisons could be sold or used at the shop as they were all locked up and the key was at the respondent's Beverley Road shop in Hull. Dispensing of medicines was not carried out at the Pocklington shop, but packed medicines, surgical and medicinal preparations (some of which included drugs but no poisons) were sold by retail. If the shop were conducted without the word "chemists" being used on the shop sign or labels used in connexion with the business, it would be a properly conducted drug store and could be carried on by an unqualified person. The respondent exhibited a card in the window of his shop informing the public at large that owing to war circumstances there was no qualified assistant in charge of the shop and that medicines could not be dispensed. The appellant, an inspector of the Pharmaceutical Society, called at the shop at Pocklington on July 2, 1946, and purchased a bottle of glycerine and rose water, and on the bottle produced there was the name "Spinks, Chemists." There was no suggestion of any impropriety in the conduct of the respondent's shop at Pocklington.

The justices, being of opinion that the notice displayed in the shop window was sufficient notice to the public to negative any suggestion, derived from the use of the word "Chemists" in the title, that the respondent or anyone employed in the business possessed any qualification other than that which he in fact possessed, dismissed the information.

The justices at the request of the appellant stated the case set out above for the decision of the Divisional Court.

" that he or anyone employed in	ing of drugs or poisons other than
" the business possesses any quali-	" the qualification which he in
" fication with respect to the	" fact possesses."
" selling, dispensing or compound-	

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The question for the opinion of the court was whether on the above statement of facts the justices came to a correct determination in point of law.

Blanco White K.C., Cecil Morgan and J. Sopher for the appellant. The question for decision in this case is whether, when a chemist owns several shops he commits an offence under the Pharmacy and Poisons Act, 1933, s. 3, sub-s. 2, if there is not a qualified chemist in charge of each shop. If a qualified chemist is not employed at a shop he must not use the title "chemist" over that shop. Section 3, sub-s. 2, of the Act must be read as if the words of the section were "he" or "any person in control of premises where the business is carried on." The section is a restrictive provision that the person in control of the premises where the business is carried on is a qualified chemist. There must be someone on the premises who is qualified to call himself a chemist. The title of chemist over the shop is a description which suggests that the person in charge of the shop is a pharmacist. Sub-section 2 of s. 3 of the Act of 1933 forbids the use of the word "chemist" over a shop where the shop is in charge of an unqualified person. Under sub-s. 1, of that section a person may not use the title "chemist and druggist" unless he is a registered pharmacist. If the word "chemist" is used over a shop it suggests that the person in charge of the shop is a registered pharmacist.

■
W. A. L. Raeburn for the respondent. The words "any business" in s. 3, sub-s. 2, of the Act of 1933 mean the business carried on by the respondent as a whole and not merely the shop where a business is carried on. The respondent, who owned the shop at Pocklington, was a registered chemist and therefore no offence was committed against s. 3, sub-s. 2, by the putting of a sign over the shop of "Spinks the Chemists," because he owned the shop and was a chemist. The section says it shall not be lawful for a person to use in connexion with a business any title or description reasonably calculated to suggest that "he or anyone employed in the business" possesses a qualification other than that which he possesses—the section does not say "he and anyone employed in the business."

LORD GODDARD C.J., after stating the facts and reading

sub-s. 2 of s. 3 of the Pharmacy and Poisons Act, 1933 continued: There are two preliminary remarks I would make. In the first place, we are dealing here with a penal section, and we have, therefore, to construe it strictly, and we are not entitled to read into the section words which are not there for the purpose of creating an offence which the statute would not otherwise create.

In the second place, the Pharmacy Acts have been in existence since 1852, and been the subject of constant amendment and expansion by Parliament until the year 1933, when the Act was passed with which we are now dealing. So Parliament has had every opportunity of amending the Acts and remedying any defects in the Acts which may have appeared from cases in the courts, or if there was a hiatus in any section, of dealing with it; and the society who may be supposed to promote the Acts have also had every opportunity of dealing with this matter. We are not concerned here with the policy of the Acts, except in so far as one gives a reasonable construction to an Act having regard to the nature and policy of the Act. We have only to see whether the statute causes the facts which are proved to be an offence.

It has been argued by Mr. Blanco White, and this is indeed his main argument, that because the word "Chemists" is used, or "chemist"—it matters not whether it is the singular or the plural—that must be calculated to suggest that the person in control of the shop is a registered chemist. In other words he would ask the court to read the words "he or anyone employed in the business possesses any qualification with respect to the selling, dispensing or compounding of drugs or poisons other than the qualification which he in fact possesses," as though the words of the section were "he or any person in control of premises where the business is carried on." I am unable to read such words as those into the section, more especially when I find that there is no prohibition in express language of the use of the word "chemist," but only of a description reasonably calculated to suggest what the Act is aimed against, and when in the very same section I find: "For the purposes of this sub-section the use of the description 'pharmacy' in connexion with a business carried on on any premises shall be deemed to be reasonably calculated to suggest that the owner of the business and the person having the control of the business on those premises are registered pharmacists."

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Speaking for myself, I should decide this case mainly on a different ground from that which commended itself to the justices, because it seems to me here that it is perfectly clear from the sections of the Act, and also from s. 15 of the repealed Act of 1908 that Parliament has always had in mind that chemists' businesses may be carried on at more than one set of premises. But they have not in the sub-section with which we are dealing dealt with the premises in which the business is carried on. What they have dealt with is that they have made it unlawful for a person to use in connexion with any business a title which suggests that he or anyone—not "and anyone"—employed in the business possesses a qualification which in fact he has not got.

Whose business was this? The business was Spink's. Spink was a chemist, and therefore so long as the business is his and he is carrying it on, although he may not be in control of the particular premises in the sense of his being personally there, the business is his, and the title represents only, as it seems to me: "This is a shop belonging to "Mr. Spink, who is a chemist."

When you contrast the language of s. 10 of this Act with the language of sub-s. 2, of s. 3, it becomes impossible to give the construction for which Mr. Blanco White has contended, because s. 10, which deals with executors of deceased chemists, and persons who carry on a business in bankruptcy or after an arrangement with creditors, provides that in each set of premises where the business is carried on the business so far as it concerns the retail sale of drugs must be under the personal control of a registered pharmacist. There you find the words "in each set of premises." Moreover, in the repealed Act of 1908, s. 3 provided: "Any person who, being "a duly registered pharmaceutical chemist or chemist and "druggist, carries on the business of pharmaceutical chemist "or chemist and druggist shall, unless in every premises where "the business is carried on the business is bona fide conducted "by himself or some other duly registered pharmaceutical "chemist or chemist and druggist, as the case may be, and "unless the name and certificate of qualification of the person "by whom the business is so conducted in any premises is "conspicuously exhibited in the premises, be guilty of an "offence." Therefore, in those cases Parliament has dealt expressly with a business carried on in more than one place, and has laid down in that repealed section and in s. 10 of this

Act what is to be done in a case where in particular circumstances a business is carried on at a set of premises and not one, but I cannot find anything in sub-s. 2 of s. 3 which deals with anything more than "the business." It seems to me, therefore, that no offence has been committed by Spink calling his shop "Spinks the Chemists" when he is a chemist and it is his shop.

The ground upon which the justices dismissed the summons was one for which I think there is a great deal to be said. I think the justices came to a sensible and on the whole correct decision, in holding that although the business was called "Spinks the Chemists," Mr. Spink had given notice to the public by a placard in the window, which the justices no doubt saw, and which indicated to the public that at the time when this placard was displayed there was not a qualified chemist in charge of the business; people could decide for themselves whether they would risk buying a bottle of fruit salts or a packet of tooth paste from the unqualified person, but it was clearly stated that no dispensing would be carried on. There again, Mr. Blanco White says that if the word "Chemist" is used, as it was over the shop, that in itself is an offence. The words of the section are "any title, emblem or description reasonably calculated to suggest," and as I understand the decision of the justices they say: "When you take the word 'Chemist' over the shop with this announcement which is contained in the placard, the word 'Chemist' is not reasonably calculated to suggest to the public that the person possesses some particular qualification which in fact he does not." I cannot help thinking that that also is right. At any rate, that seems to me to be a question of fact, because whether a thing is reasonably calculated to achieve a certain effect must in all cases be a question of fact, and I repeat that that conclusion seems to me to be strengthened by the further provisions of the sub-section, which says if you use the word "pharmacy," that is to be deemed to achieve this result. It does not say that the use of the word "chemist" is to be deemed to achieve that result. If you use the word "pharmacy," it might be a very nice question whether or not a notice would achieve the result it was intended to, because of the precise words of the section. I cannot find anything which makes the use of the word "chemist," if I may so put it, irrebuttable, and the justices have found here that it was not reasonably calculated to suggest what the section was aimed at. Therefore, in my opinion, on that ground also the

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justices came to a correct decision in point of law on the facts they found, and for these reasons I would dismiss the appeal.

ATKINSON J. I agree. I do not want to travel over the ground covered by the Lord Chief Justice, because I agree with what he has said, but I would just add this : It seems to me that the first thing to do is to look at the emblem or description which is being attacked and see what that implies, "Spinks the Chemists"; there is not a simple use of the word "Chemists." If you have over your shop window merely "Chemists," it might be somewhat different, but here you have "Spinks the Chemists," which means, I should have thought "This is a branch of the business carried on by the well-known Mr. Spink," or something of that sort, and it certainly would imply that Mr. Spink was a qualified person. He is, but then the argument is that that description must inevitably also be deemed to imply that the person in control of the business is also a registered chemist. That is where I cannot follow the argument. Parliament knew perfectly well how to express a provision of that kind, because s. 3 of the Act of 1908, with the provisions relating to deceased chemists, bankrupt chemists and to chemists who sell poison, makes it clear in plain language that the provisions relate not merely to the owner, the person to whom the business belongs, but also to the person in control.

The final screw in the coffin of the argument for the appellant is found in the latter part of sub-s. 2 where, in connexion with the word "pharmacy," it is provided that that word shall be deemed to be reasonably calculated to suggest that the owner of the business and the person having control are registered practitioners. It is all very well to argue that the word "chemist" has to be treated as if it were the word "pharmacist," but the section does not say so, and therefore, to my mind, it is impossible to say we are to construe this title, "Spinks the Chemists" as inevitably, quite apart from the placard in the window, suggesting that the person having control of the business was also a registered practitioner.

OLIVER J. I agree, and cannot usefully add anything.

Appeal dismissed.

Solicitor for appellant : A. C. Castle.

Solicitors for respondent : *Smith & Hudson, for Mainprize, Rignall & Whitworth, Hull.*

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C. A.

Agriculture—Agricultural holding—Notice to quit—Dispute as to validity—Order of High Court for possession—Claim for compensation for disturbance—Question whether tenant quitted “in consequence of” the notice—Reference to arbitrator under Arbitration Acts—Jurisdiction of arbitrator—Agricultural Holdings Act, 1923 (13 & 14 Geo. 5, c. 9), ss. 12, sub-ss. 1, 6; 16, sub-ss. 1, 2; 57, sub-ss. 1, 2; sch. II.

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May 1, 2, 3;
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Lynskey J.

The landlords gave notice to quit to the tenants of an Agricultural Holding, who disputed its validity and held over. The landlords brought an action in the High Court and obtained judgment for possession. The tenants quitted the holding and claimed compensation for disturbance. The question whether they were persons entitled to claim was referred to arbitration under the Arbitration Acts, not to a statutory arbitrator under the Agricultural Holdings Act, 1923. The arbitrator stated his award in the form of a special case for the opinion of the High Court:—

Held, (1.) that the question whether a tenant of an agricultural holding quitted “in consequence of the notice” to quit within the meaning of s. 12, sub-s. 1, of the Agricultural Holdings Act, 1923, was one of fact, on which the finding of the arbitrator was conclusive if there was evidence to support it. The test was not whether there was an interval of time between the expiration of the notice and the tenant's departure, but whether there was any break in the causal sequence between the giving of the notice and the quitting of the holding. In the present case, since the real question in the High Court action was the validity of the notice, the arbitrator was entitled to find (as he did) that the tenants quitted in consequence of the notice.

(2.) That the words “tenant” and “holding” as defined by s. 57, sub-s. 1, of the Agricultural Holdings Act were not to be so narrowly construed as necessarily to exclude a person who had been, but had ceased to be, a tenant, or land which had been, but had ceased to be, a holding, and that the tenants were not debarred from compensation because the particulars mentioned in s. 16, sub-s. 2, were not given within two months of the expiration of the notice to quit, but only within two months of their actual quitting of the holding.

(3.) That the arbitrator under the Arbitration Acts had jurisdiction to determine the question submitted, and the High Court had consequently jurisdiction to consider the award in the form of a special case.

Cave v. Page [1923] W. N. 178, and *Mills v. Rose* [1923] W. N. 330 considered.

Ratio decidendi in *Lowther v. Clifford* [1927] 1 K. B. 130 held binding and followed on the question of jurisdiction.

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This case came before the court on an award in the form of a special case by an arbitrator under the Arbitration Acts. The landlords, the Norfolk County Council, by agreements dated December 9, 1921, and April 6, 1927, let to the tenants Henry John Preston and Arthur Ernest Preston, under the powers contained in the Small Holdings and Allotments Acts, 1908 to 1926, certain lands and buildings known as Willow Farm, Burlingham in the county of Norfolk. By notice to quit dated October 9, 1941, the landlords required the tenants to give up possession of Willow Farm on October 11, 1942. The tenants failed to give up possession, and on October 13, 1942, the landlords issued a writ for possession. The tenants filed a defence alleging (*inter alia*) that they were lawfully in possession, and did not admit the notice to quit, which they said was bad in law, and not given in good faith. On June 7, 1943, Oliver J., at Norwich Assizes, gave judgment for the landlords for possession of the land and buildings on specified dates, and for mesne profits. He directed that (*inter alia*) the tenants' claim for compensation for disturbance under s. 12 of the Agricultural Holdings Act, 1923 (1) should be

(1) Agricultural Holdings Act, 1923, s. 12, sub-s. 1: "Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then, . . . compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section."

Sub-s. 6: "The compensation payable under this section shall be a sum representing such loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur upon or in connexion with the sale or removal of his household goods, implements of husbandry, fixtures, farm produce or farm stock on or used in connexion with the holding, and shall include any expenses reasonably incurred by him in

"the preparation of his claim for compensation (not being costs of an arbitration to determine the amount of the compensation), but for the avoidance of disputes, such sum shall, for the purposes of this Act, be computed at an amount equal to one year's rent of the holding, unless it is proved that the loss and expenses so incurred exceed an amount equal to one year's rent of the holding, in which case the sum recoverable shall be such as represents the whole loss and expenses so incurred up to a maximum amount equal to two years' rent of the holding."

Section 16, sub-s. 1: "Any question or difference arising out of any claim by the tenant of a holding for compensation payable under this Act . . . and any other question or difference of any kind whatsoever between the landlord and

referred to arbitration, failing agreement between the parties' valuers; in the result, the matter went to arbitration, under the Arbitration Acts; not to a statutory arbitrator under the Act of 1923. The landlords contended that the tenants were not entitled to compensation for disturbance: (a) Because the tenants had not quitted the holding "in consequence of the notice" to quit, which they had claimed to be invalid, but only by reason of the judgment of the High Court; (b) that the particulars required by s. 16, sub-s. 2, of the Agricultural Holdings Act, 1923, were not given by the tenants before the expiration of two months from the termination of the tenancy, having been given, as was agreed, by a document dated November 18, 1943 (which was within two months from their actual departure). The question for the opinion of the court was whether the tenants were entitled to compensation for disturbance.

Lord Goddard C.J. held that the tenants were entitled to compensation, and gave leave to appeal.

Havers K.C. and *Kenneth Diplock* for the landlords. Of the three questions raised before the Lord Chief Justice only one is raised here. It is whether a tenant of an agricultural holding who has wrongfully held over after his tenancy has

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"the tenant of the holding arising out of the termination of the tenancy of the holding and any other question which under this Act is referred to arbitration shall be determined, notwithstanding any agreement under the contract of tenancy or otherwise providing for a different method of arbitration, by a single arbitrator in accordance with the provisions set out in the Second Schedule to this Act."

Sub-s. 2: "Any such claim as is mentioned in this section shall cease to be enforceable after the expiration of two months from the termination of the tenancy unless particulars thereof have been given by the landlord to the tenant or by the tenant to the landlord, as the case may be,

"before the expiration of that period."

Section 57, sub-s. 1: "In this Act, unless the context otherwise requires 'Tenant' means the holder of land under a contract of tenancy and includes the executors or other person deriving title from a tenant.

"'Holding' means any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord."

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been duly determined and only gives up possession some months later as the result of an order for ejectment, is entitled to compensation for disturbance under s. 12 of the Agricultural Holdings Act, 1923. Section 12 confers the right to compensation for disturbance on a tenant who has quitted his holding "in consequence of a notice to quit." It is contended that the tenants in the present case are not entitled to compensation because they did not quit their holding at the termination of the tenancy or in consequence of the notice to quit. [They also referred to s. 13, s. 16, sub-s. 2, and ss. 30, 54 and 57.] Originally on the proceedings for possession the tenants set up a number of defences and made allegations of bad faith against the Council. Oliver J. found that there was no justification for any of the defences and gave judgment for possession and mesne profits. It cannot then be said that the tenants left by reason of the notice to quit. In *Cave v. Page* (1) it was held that for compensation to be payable the holding must be given up on the termination of the tenancy. That was under an earlier Act which did not contain the same language as s. 12 of the 1923 Act. This case was never cited to the Court of Appeal in *Mills v. Rose* (2), a case decided under s. 12 of the Agricultural Holdings Act, 1920.

[LORD GREENE M.R. Even though we approved of the earlier decision in *Cave v. Page* (1) are we at liberty to differ from *Mills v. Rose* (2) seeing that it is a decision on precisely the same language as we have to deal with?]

Here the court has to construe the words "in consequence of such notice" to quit, which are very strong and really conclusive against the tenants who only vacated their holding after an ejectment order had been made. In *Hendry v. Walker* (3) the Scotch court followed *Cave v. Page* (1) in preference to *Mills v. Rose* (2). The court here is entitled to follow *Cave v. Page* (1) while accepting in part the decision in *Mills v. Rose* (2). A tenant who holds over is not entitled to any compensation for disturbance. Why should the tenants get this statutory right when they have deprived the landlords of their common law rights. [They also referred to *Dale v. Hatfield Chase Corporation* (4).]

[Lord Greene M.R. The question is whether and how far we are bound by previous decisions in *Cave v. Page* (1) and

(1) [1923] W. N. 178.

(2) [1923] W. N. 330.

(3) [1927] S. L. T. 333.

(4) [1922] 2 K. B. 282.

Mills v. Rose (1), as to the meaning of the words "in consequence of." To bind this court it must be *decision*, not dictum. At present, it looks rather as though *Cave v. Page* (2) in a dictum was in favour of the landlord, while in *Mills v. Rose* (1) that point was not argued and apparently was not present to the mind of the court. How far can it be said that the *decisions* are conflicting? Can you say that if the decision in the first case had been brought to the attention of the court in the second case, it would have been bound to follow it?]

It is submitted that that is the position, and if *Cave v. Page* (2) had been cited in *Mills v. Rose* (1) the court would have been bound.

Young v. Bristol Aeroplane Co. (3) was cited as to the effect of decisions given per incuriam.

Percy Lamb for the tenants. This case depends entirely on the construction of a statute. This was a remedial section. Before 1920 a tenant of an agricultural holding was not entitled to compensation for disturbance unless the disturbance was unreasonable. Section 10 of the 1920 Act gives compensation for *any* disturbance and s. 12 now under consideration is identical with s. 10.

The construction which the respondents seek to put on it is contrary to well-established principle; and the decisions of the Court of Appeal in *Mills v. Rose* (1) and of Lord Goddard C.J. in the present case are in accord with those principles.

The requisites are (1.) that the tenancy is determined by notice to quit; (2.) that the tenant shall vacate the holding. Effluxion of time will not give the right to compensation. If the tenant remains in possession after the tenancy is determined, he will not get compensation. He must leave in consequence of the notice to quit, he must give notice of his intention to claim, and he must give particulars. If the landlords are right, a farmer who is given notice to quit cannot go to court to determine whether the notice is valid without running the risk of losing a minimum of a year's rent. If a remedy is provided by statute for something not previously conferring any right, the courts ought to construe the statute in such a way as to make the remedy most effective (see Blackstone's Commentaries, 8th ed., vol. 1., p. 87, and *Shannon Realities, Ltd. v. St. Michel* (4)). That was precisely in point in construing s. 12,

(1) [1923] W. N. 330.

(2) [1923] W. N. 178.

(3) [1946] A. C. 163.

(4) [1924] A. C. 185, 192.

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because if the right construction was that contended for by the landlords it would rob the tenant of his common law right to go to the courts to contest the validity of a notice to quit. *Dale v. Hatfield Chase Corporation* (1), relied on by the landlords was a decision on different words in s. 11 of the Act of 1908. The question was who was the landlord liable to pay compensation, where the property changed hands?

As to the meaning of "tenant," the judgment of Lord Goddard C.J. is right for the reasons he gave, and if read carefully s. 16, sub-s. 2, puts no real difficulty in the tenants' way, though it is admitted to be the main obstacle. There is nothing destructive of the argument in ss. 8 and 30, for under those sections it is immaterial whether the tenant holds over or not. In the present case, all the requirements are fulfilled. The holding was terminated by a notice to quit, and unless the court follows *Mills v. Rose* (2) the tenants are deprived of the compensation which Parliament said should be theirs. The court is asked to prefer *Mills v. Rose* (2) to *Cave v. Page* (3) which it is entitled to do under the principle in *Young v. Bristol Aeroplane Co.* (4).

Havers K.C. in reply. There is no right at common law for a tenant to stay on his landlord's premises to test the validity of a notice to quit. He becomes a trespasser from the expiration of the notice. If the tenants are right, one might have the curious result under s. 11 that a trespasser would have a right against the landlord to compensation for damage by game. Section 57 covers possible difficulties as to the meaning of "landlord" and "tenant."

Cur. adv. vult.

On May 23, 1947, the court restored the case to the list after notice to the parties that they desired to hear argument on the question whether an arbitrator under the Arbitration Acts (and consequently the High Court on an award stated in the form of a special case) had jurisdiction to determine the question whether the tenants were persons entitled to claim compensation, or whether that question could only be determined by a statutory arbitrator under the Agricultural Holdings Act, and, if he stated a case, by the county court.

Diplock for the tenants. Section 16, sub-s. 1, is the material section.

It may be thus analysed :

(1) [1922] 2 K. B. 282.

(2) [1923] W. N. 330.

(3) [1923] W. N. 178.

(4) [1946] A. C. 163.

I. Any question or difference arising
(1.) out of any claim by the tenant of a holding against the landlord

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(a) for compensation payable under this Act or
(b) for any sum claimed to be due to the tenant from the landlord

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(i.) for any breach of contract or
(ii.) otherwise in respect of the holding, or
(2.) out of any claim by the landlord against the tenant
(a) for waste wrongly committed or permitted by the tenant or

(b) for any breach of contract or
(c) otherwise in respect of the holding, and
II. any other question or difference of any kind whatsoever between the landlord and the tenant of the holding

(1.) arising out of the termination of the tenancy of the holding or

(2.) arising, whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy, and

III. any other question which under this Act is referred to arbitration

shall be determined . . . by a single arbitrator in accordance with the provisions set out in the Second Schedule to this Act.

I. (1.) (a) is the clause material in this case; it is to be observed that there is a difference of wording between I. (1.) (a) "compensation payable" and I. (1.) (b) "any sum claimed to be due."

In *Simpson v. Batey* (1) the question whether the tenancy had or had not terminated did not come within the section at all. In *Rex v. Powell* (2) the Divisional Court took the view that all the categories down to II (1.) inclusive were governed by the words "arising out of the termination of the tenancy of the holding," but that was overruled by *Lowther v. Clifford* (3). In *Harrison v. Ridgway* (4) the court had felt itself bound to follow *Rex v. Powell* (2) but Scrutton L.J. expressed his dissatisfaction, and propounded the view which was subsequently adopted in *Lowther v. Clifford* (3). *Olive v. Paynter* (5) is, with respect, a very odd decision. If I am wrong Oliver J. had no jurisdiction to make this order, and agreement of the parties would not save it.

[LORD GREENE M.R. Compensation is distinct from

(1) [1924] 2 K. B. 666.

(4) [1925] 133 L. T. 238.

(2) [1925] 1 K. B. 641.

(5) [1932] 2 K.B. 666.

(3) [1927] 1 K. B. 130.

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damages. Your classification I. (1.) (a) is compensation arising only under the Act. I. (1.) (b) is breach of contract, for which the remedy is damages. It may be that in *Olive v. Paynter* (1) the Court of Appeal was seeking to avoid applying to common law rights subject to the normal six years limitation, the stringent limitation under s. 16 applicable to the statutory right to compensation.]

The question of jurisdiction has been dealt with in Scotland under the identical provisions of the Scottish Act in *Hendry v. Walker* (2) and *Donaldson's Hospital v. Esslemont* (3). As to the effect of defective jurisdiction in inferior courts *Bunbury v. Fuller* (4), *Colonial Bank of Australasia v. Willan* (5) and *Rex v. Bradford* (6) were cited.

Percy Lamb for the tenants adopted *Diplock's* argument and did not address the court.

June 16., The judgment of the court was read by LORD GREENE M.R. The question of substance raised by this appeal is one of some general importance under the Agricultural Holdings Act, 1923. There are two decisions of this court under earlier Acts which on one view are said to be inconsistent with one another and on any view call for careful examination. We shall postpone consideration of them until we have stated the conclusions to which, apart from authority, we should ourselves have come upon the true interpretation of the relevant provisions of the Act. We shall then consider whether those conclusions are open to us having regard to the authorities.

The appellants, the landlords, served upon the respondents, the tenants, a notice to quit their holding which expired on October 11, 1942. The tenants failed to give up possession. On October 13, 1942, the landlords issued a writ and by a judgment of Oliver J. dated June 7, 1943, the tenants were ordered to give up possession. The judgment contained a number of provisions relating to incidental matters which, although purely consensual, were not expressed, as they ought to have been, to be such in the order. One of these provisions directed that, in default of settlement by valuers, two matters should be submitted to arbitration of which one is the question relevant to this appeal, namely, the tenants' claim

(1) [1932] 2 K. B. 666.

(2) (1927) S. L. T. 333.

(3) 1925 S. C. 199.

(4) (1853) 9 Exch. 111, 140.

(5) (1874) L. R. 5 P. C. 417.

(6) [1908] 1 K. B. 365.

for compensation for disturbance under s. 12 of the Agricultural Holdings Act, 1923. This matter went to arbitration and by what purports to be an award in the form of a special case, there was submitted for the opinion of the court the question whether, having regard to the facts in the case, the terms of the submission and the documents referred to in the schedule to the case the tenants were entitled to any compensation for disturbance. If they were so entitled, the arbitrator awarded them the agreed sum of 212*l.* 10*s.* *od.*

At this point we must interpose a reference to a preliminary point of considerable difficulty, namely, whether, having regard to the special provisions of the Act of 1923, the arbitrator had jurisdiction to act and consequently whether Lord Goddard C.J. and on appeal from him, this court, had jurisdiction to deal with the special case. Logically we should deal with this question first. But as we have come to the conclusion that we are bound by authority to say that the jurisdiction exists and as the nature of the question as to jurisdiction will, we think, be more readily intelligible after we have examined the provisions of the Act which bear on the point of substance, we will defer our examination of the question of jurisdiction until we have dealt with the point of substance.

It is argued on behalf of the landlords that as the tenants failed to give up possession on the expiration of the notice to quit they were not entitled to any compensation for disturbance. Two reasons were given for this. The first was that the tenants cannot be said to have quitted the holding "in consequence of" the notice to quit since they had refused to do what the notice required them to do and only gave up possession under the compulsion of the judgment of Oliver J. They quitted the holding, it was said, not in consequence of the notice, but in consequence of the judgment. The other reason was that on the expiration of the notice to quit the tenants became trespassers and ceased to be a "tenant," while the "holding" which they had occupied was no longer a "holding." In other words, for both reasons, it was said, compensation for disturbance under the sub-section can only be claimed where the tenant quits voluntarily on the expiration of the notice. This result, it was said, would be in accordance with the apparent purpose of the Act which cannot be to assist tenants who wrongfully refuse to comply with a notice to quit.

For the tenants, it was argued that as the notice to quit is

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the essential step which gives rise to the claim to recover possession and is thus the real foundation of the judgment, a tenant who quits under the judgment is truly said to quit "in consequence of" the notice. As to the second of the two reasons put forward on behalf of the landlords, the tenants replied that on the true construction of the Act, the words "tenant" and "holding" in this particular context and elsewhere in the Act must be interpreted as including a person who was, but has ceased to be, a tenant and land which was, but has ceased to be, a holding; and they rely particularly on sub-s. 2 of the interpretation section, s. 57, to which we will refer when we come to deal with this second reason.

We will now return to the first of the two reasons advanced on behalf of the landlords, and we will deal with it on the assumption that the second reason is a bad one, that is, that for the purposes of s. 12, sub-s. 1, a tenant who has held over may still be a "tenant" and his holding may still be a "holding." On this basis, as it seems to us, the question whether or not a tenant who holds over for any period, be it short or be it long, after the expiration of a notice to quit, and subsequently quits the holding, can be said to have quitted the holding "in consequence of" the notice, is really a question of fact on which the finding of an arbitrator under the Act is conclusive, provided that there is evidence to support it. In spite of the fact that a tenant holds over, it may well be that the notice is what causes him to quit the holding. To explain our meaning, we will give two examples. At the expiration of the notice, the tenant may be in bed seriously ill, and incapable of moving. In the absence of permission to remain, he becomes in a law a trespasser. Nevertheless, if when he recovers sufficiently to enable him to be moved, he at once quits the holding, the inevitable conclusion would be that he did so "in consequence of" the notice. His temporary failure to comply with the notice could not break the causal link between the notice and his departure which is all that is postulated by the words "in consequence of." The other example is the case of a tenant who disputes the validity of the notice and requires a decision of the court upon it. Either he or the landlord may (subject to the arbitration provisions if they apply) obtain that decision by an originating summons or by an action for a declaration. If in such a case the court decided against the tenant, and the tenant thereupon quitted the holding, the inevitable inference would, we think, be that he

had done so "in consequence of" the notice since the notice and nothing but the notice would have been the effective cause of his departure. On the other hand, there may well be cases in which the arbitrator would be at liberty to find on the facts that the necessary causal link between the notice and the quitting of the holding did not exist.

If this view be right it gives rise in the present case to an apparent difficulty, since there is no finding of the arbitrator on the question whether the tenants quitted the holding "in consequence of" the notice. That question is really involved in the question submitted to the court, that is, whether the tenants on the facts are entitled to compensation for disturbance. The difficulty is, we think, apparent rather than real, since upon the facts stated, we do not think that it would have been open to the arbitrator to find that the tenants quitted the holding otherwise than "in consequence of" the notice. The case we think falls within the principle of our second example. It is true that the validity of the notice was tested and established by means of an action to recover possession. We do not think, however, that the answer to the question can depend on whether an ejectionment order is or is not in fact asked for or made. In order to ascertain whether what we have called the "causal link" exists or not, it is, we think, necessary to look beyond the mere form of the action, and the mere form of the order. In the present case a reference to the defence, put in by the tenants in the action before Oliver J. shows that under a certain amount of pleader's verbiage, the real point which fell to be determined was the validity of the notice, which was attacked on a number of grounds, one at least of which, namely, that the notice was not given bona fide (whatever that may mean), was quite irrelevant. But it was a ground put forward for saying that the notice was invalid. In these circumstances we do not think that it would have been open to the arbitrator to find that when after the judgment the tenants quitted the holding, they did so otherwise than "in consequence of" the notice the validity of which had been established by the judgment.

We now come to the second of the two reasons for rejecting the tenants' claim which are put forward on behalf of the landlords. In considering the first reason we assumed that the second reason was a bad one. It depends on the true meaning to be attributed to the words "tenant" and "holding" in the context.

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We should ourselves have thought that to interpret the words "tenant" and "holding" as necessarily excluding a person who had been but had ceased to be a tenant, and land which had been but had ceased to be a holding, would have been to place an unwarrantably narrow construction on those words, particularly in view of the language of sub-s. 2 of s. 57. But we are relieved of the necessity of considering this question by itself—a course which would have placed us in some difficulty in view of the case of *Cave v. Page* (1) hereinafter referred to—since any such construction is, in our opinion, excluded by the language of s. 12, sub-s. 1, itself. We have already discussed the meaning of the phrase "in consequence of." The special significance of that phrase for this branch of the argument lies in the fact that, as we have pointed out, it postulates as a necessary condition of a claim for compensation the existence of nothing more than a causal link between the notice and the quitting. This appears to us to lead inevitably to the conclusion that the existence of a gap in time between the determination of the notice and the quitting by the tenant cannot possibly defeat a claim to compensation once the causal link is established. In other words, a tenant who quits in consequence of the notice, even if he does so after some interval of time, must be regarded as a tenant for the purposes of s. 12, sub-s. 1, and similarly with the word "holding."

Counsel for the landlords relied on certain other passages in the Act in order to show the inconveniences which might result if the tenants were right. The most important of these points are as follows. Under s. 12, sub-s. 6, compensation for disturbance is to be a sum representing "such loss or expense" directly attributable to the quitting of the holding as the "tenant may unavoidably incur upon or in connexion with the" "sale or removal of" his household goods, implements, stock, etc. Under sub-s. 7 compensation is not to be payable (a) in respect of a sale unless the tenant has before the sale given the landlord a reasonable opportunity of making a valuation; (b) unless the tenant has not less than one month "before the termination of the tenancy" given written notice of his intention to claim. Under s. 16, sub-s. 2, a claim for (among other things) compensation for disturbance ceases to be enforceable "after the expiration of two months from the" "expiration of the tenancy" unless particulars of the claim have been given to the landlord. These references to "the

(1) [1923] W. N. 178.

"expiration of the tenancy" are relied on as showing that the legislature cannot have contemplated the existence of an interval of time between the expiration of a notice to quit (which terminates the tenancy) and the quitting of the holding by the tenant. In particular, it is asked, how can the necessary information be given under s. 16, sub-s. 2, if the quitting of the holding which puts the tenant to the expense upon which his claim to compensation is based, does not take place, as it well may not, for months after the termination of the tenancy?

The answer to these objections is, we think, a short one. It may very well be that the legislature did not direct its mind to any case other than the normal one in which the tenant quits on the expiration of the notice. But we are concerned with the language which the legislature has used and if, as we think, that language is clear, the possibility that unforeseen inconveniences may arise in practice must be ignored. It may be that by reason of s. 16, sub-s. 2, the time within which a tenant can hold over without losing his claim to compensation is curtailed. But we express no opinion on this point which admittedly does not arise in the special facts of the present case.

At this point we may conveniently refer to the authorities in this court, of which mention has already been made. They are both reported in the 1923 volume of the Weekly Notes and no fuller report appears to exist in either case. The first, *Cave v. Page* (1), decided on April 20, 1923, by a court consisting of Sir Henry Duke P., Bankes and Scrutton L.JJ. The statute which was applicable was the Agricultural Holdings Act, 1908. That Act provided by s. 11 for compensation for disturbance but only where the landlord had acted unreasonably as mentioned in the section. The words of the section were that in the cases mentioned "the tenant, upon quitting the holding, shall . . . be entitled to compensation for the loss or expense directly attributable to his quitting the holding which the tenant may unavoidably incur upon or in connexion with the sale or removal" of his household goods, implements, stock, etc. The relevant provisions of the interpretation section, s. 48, were in substance the same as those already quoted from the Act of 1923. Notice to quit was served expiring on March 25, 1920, but the tenant held over and was finally removed from the holding on January 1, 1921, pursuant to an ejectment order made on November 5 in proceedings instituted by the landlord. He had furnished details of his claim for com-

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pensation on December 29, 1920, nine months after the notice to quit expired, but three days before he was actually ejected. Paragraph (d) of s. 11 of the Act provided that no compensation under the section should be payable if the claim was not made within three months after "the time at which the tenant quits the holding." The tenant claimed that his claim was made within three months of his quitting the holding and that he was entitled to compensation. The question submitted by the arbitrator was whether he was so entitled notwithstanding that nine months had elapsed between the termination of the tenancy and the furnishing of the claim, and in view of the fact that the claim was made within three months of his quitting the holding. The county court judge decided that the tenant was not so entitled and this court affirmed his decision. Sir Henry Duke, P. said that the case depended on the words "the time at which the tenant quits the holding." He referred to the meanings of the words "tenant" and "holding" as given in the interpretation section, but neither he nor either of the Lords Justices referred to sub-s. 2, of that section, which is similar to sub-s. 2 of s. 57 of the Act of 1923 (already quoted), providing for the continuation of the designation of landlord and tenant until the conclusion of any proceedings. The learned President then proceeded to say that, having regard to the interpretation section, from March 25, 1920, the tenant was not holding under a contract of tenancy and the land which he persisted in occupying was not a holding within the meaning of s. 11. Bankes L.J. agreed and said by way of dictum that the question in the case was not likely to arise again, because it was set at rest by s. 10 of the Agriculture Act, 1920, which had then recently been passed, but did not apply to the case. This Act of 1920 had extended the right to compensation for disturbance to cases other than cases of unreasonable conduct by the landlord, and the language of s. 10 was, for all relevant purposes, the same as that of s. 12 of the Act of 1923. In particular, it for the first time used, in relation to the tenant's right to compensation, the expression "where . . . in consequence of such notice the tenant quits the holding," in place of the words "upon quitting the holding" in s. 11 of the Act of 1908. Bankes L.J. appears to have thought that these new words would have excluded the right to compensation in such a case as that before him. This, of course, was dictum only, and with deference we cannot agree with it, save on the assumption that on the facts, it could properly have been found that the tenant,

who appears to have been physically removed from the holding, had not quitted in consequence of the notice. But on the actual case, Bankes L.J. refused to accept the meaning of the words "quits the holding" as being "takes his final departure from the holding," an interpretation which would have benefited those who broke their contracts. He also agreed with the President's view that the interpretation section excluded such a meaning. Scrutton L.J. agreed.

We are not, of course, entitled to say that this decision was wrong. But it was a decision on a different statute, and it in no way binds us in the present case. Indeed, assuming as we must, that the interpretation put by the court on the Act of 1908 was right, it was based upon the view that there must be a coincidence in time between the expiration of the notice and the quitting of the holding. The Acts of 1920 and 1923 on the other hand, as we have already said, appear to us to have envisaged, by the use of the phrase "in consequence of," not a coincidence in time, but what we have described as a causal link between the notice and the quitting.

This brings us to the second of the two cases, *Mills v. Rose* (1), which was heard on the following November 23 by a court consisting of Bankes, Scrutton and Atkin L.JJ. It was a case under the Act of 1920, and the court had to construe the words "in consequence of" in relation to the facts found by the arbitrator. Notice to quit was given expiring on March 25, 1922. On February 18 the tenant gave notice of intention to claim compensation for disturbance. The tenant gave possession of the land immediately after March 25, 1922, but did not quit the farm house owing to the serious illness of his wife. On May 29, 1922, the landlord obtained judgment for possession in default of appearance and a writ of possession was executed on June 28. This court reversed the decision of the county court judge on the special case, and held that the tenant was entitled to compensation. *Cave v. Page* (2) does not appear to have been quoted nor is it referred to in any of the judgments.

The arbitrator in announcing his decision by letter had found that the tenant quitted his holding in consequence of the notice to quit. Bankes L.J. said that on this finding, no question of law arose, and that it was impossible to say that there was no evidence to support it. He thus treats the question as one of fact, as we ourselves regard it. The special case had, however, been demanded and Bankes L.J. said of

(1) [1923] W. N. 330.

(2) [1923] W. N. 178.

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it that it did not enable the court to decide whether the tenant did or did not in fact leave in consequence of the notice. He went on to say, however, that the obtaining and execution of the writ of ejectment were "in consequence of the notice to quit"—in other words, that it was not open to the arbitrator on the facts to hold otherwise. With this, if we may say so, we respectfully agree, since the only reason which appears why the tenant did not give possession of the farmhouse was the serious illness of his wife. Scrutton L.J. agreed that the proceedings were in consequence of the notice to quit, and saw nothing that would entitle the landlord to any finding other than that the tenant did quit the holding in consequence of the notice to quit. Atkin L.J. thought that there was no question of law and said that "although the tenant was put out by a writ of execution he none the less quitted the holding in consequence of a notice to quit inasmuch as the landlord's right to a judgment in ejectment depended upon the notice to quit."

Save in so far as the opinions expressed appear to lay it down that in every case where there is a notice to quit followed by ejectment proceedings it must necessarily be said that the tenant quitted the holding in consequence of the notice, this decision appears to us to be in complete accord with the conclusions to which we have come independently of it. It treats the question as one of fact, it affirms our view as to the causal link implied by the words "in consequence of," and it disaffirms the view that coincidence in time between the expiration of the notice and the quitting of the holding is necessary before a claim to compensation can be made. On the matter above referred to in which the opinions expressed appear to go beyond what we ourselves think is the correct view, those opinions were, in our judgment, unnecessary to the decisions, and we venture respectfully to disagree with them. In any case, if they be right and our view is wrong, the reasons for deciding the present case as we do decide it are, of course, strengthened. There appears to us to be no real conflict between this decision and the decision in *Cave v. Page* (1) because the latter was a decision on quite different language.

Two other cases were relied on by counsel for the landlords. With one of them—*Dale v. Hatfield Chase Corporation* (2)—we need not deal. The point in it which is relied on is that under

(1) [1923] W.N. 178.

(2) [1922] 2 K. B. 282.

the Act of 1908 the person liable to pay the compensation is the person who was the landlord at the expiration of the notice to quit. This does not appear to us to have any bearing on the present question. The other case was that of *Hendry v. Walker* (1) decided by the Lord Ordinary (Lord Constable) in the Outer House of the Court of Session on December 1, 1926. The Act there in question was the Agricultural Holdings (Scotland) Act, 1923, which for the relevant purposes contains similar provisions to those contained in the English Act of 1923. The tenant had refused to quit on the expiration of notice to quit, his ground being that the notice was invalid. Ultimately the landlords obtained a decree of removal. The Lord Ordinary after holding that he had jurisdiction to consider the questions (1.) whether the tenant was a "tenant quitting the holding," and (2.) whether he quitted the holding "in consequence of the notice to quit," proceeded to examine the cases of *Cave v. Page* (2) and *Mills v. Rose* (3). *Cave v. Page* (2) in his opinion supported the view that question (1.) should be answered in the negative and the judgment of Bankes L.J. in that case appeared to him to suggest that a negative answer should be given to question (2.) also. He felt, however, some difficulty in reconciling the decision in *Cave v. Page* (2) with that in *Mills v. Rose* (3). On the whole he preferred the reasoning in the latter case; but he preferred to base his judgment on the answer which he thought should be given to question (1.) upon the authority of the reasoning in *Cave v. Page* (2), that is, that for more than a year prior to his removal there had neither been a "holding" within the meaning of the Act nor a "tenant" thereof. He thought that "the language and the provisions of the Act plainly imply that the quitting of possession upon which the statutory claim emerges shall take place at or immediately after the termination of the tenancy." With respect we cannot agree with this broad proposition and we have already given our grounds for thinking that the reasoning upon which the decision in *Cave v. Page* (2) was based is not applicable to cases under the later Acts.

Lord Goddard C.J., decided the point of substance in favour of the tenants. He found difficulty in reconciling the decisions in *Cave v. Page* (2) and *Mills v. Rose* (3), but he preferred the reasoning in the latter case. We do not share his difficulty

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(1) (1927) S. L. T. 333.

(3) [1923] W. N. 330.

(2) [1923] W. N. 178.

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in the matter of reconciliation for reasons already explained. But with the modification which we have explained earlier in this judgment we respectfully agree with him in his preference for the reasoning in *Mills v. Rose* (1).

We will now deal shortly with the question of jurisdiction. This question was raised by Lord Goddard C.J. himself, who, without expressing any opinion of his own, thought it right to follow two decisions in the Court of Session in order that there might be uniformity of practice. The question arises in this way. Under s. 16, sub-s. 1, of the Act of 1923, "any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under this Act . . . or otherwise in respect of the holding . . . and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding . . . and any other question which under this Act is referred to arbitration shall be determined, notwithstanding any agreement under the contract of tenancy or otherwise providing for a different method of arbitration, by a single arbitrator in accordance with the provisions set out in the Second Schedule to this Act." The Second Schedule contains a set of rules as to arbitration the object of which appears to be to provide a cheap and simple method of dealing with disputes. Under r. 10 the arbitrator is empowered and may be directed by the judge of the county court to state in the form of a special case "for the opinion of that court" any question of law arising in the course of the arbitration. Both parties before us very naturally supported the view that Lord Goddard C.J. had, and that on appeal from him, this court had jurisdiction to deal with the matter in controversy, and we did not have the advantage of hearing any argument to the contrary. On considering our judgments, we found it desirable to restore the case to the list for further hearing on the question of jurisdiction, and we had the advantage of hearing a very helpful argument from Mr. Diplock. We are bound to confess that apart from authority, we should have thought that the present question was covered by s. 16, sub-s. 1, and that the statutory arbitrator and the county court judge had exclusive jurisdiction: and that in consequence (1.) the order of Oliver J. as to arbitration, (2.) the consequential submission by the parties, (3.) the

(1) [1923] W. N. 330.

special case, (4.) the hearing before Lord Goddard C.J. were contrary to the provisions of the statute, and that this court could have no jurisdiction save on an appeal from a decision of a county court judge. It is noticeable that both in *Cave v. Page* (1) and in *Mills v. Rose* (2), no doubt appears to have suggested itself to the mind of this court as to the jurisdiction of the county court judges from whom the appeals in those cases were brought. But the subject of the scope of s. 16, sub-s. 1, was much debated in later cases—in which neither *Cave v. Page* (1) nor *Mills v. Rose* (2) appear to have been cited. We do not propose to burden this judgment by a detailed examination of the authorities, since we feel bound by what appears to us to be the ratio decidendi of the decision of this court in *Lowther v. Clifford* (3). The point which it was argued in that case must go to arbitration under the statute, was different from the point which we have had to consider, but the court placed a limited construction upon s. 16, sub-s. 1. The substance of the decision was, as it appears to us, that s. 16, sub-s. 1, must be construed as a procedure section dealing only with those matters which in other parts of the Act are referred to arbitration. It is not for us to criticize the reasoning upon which this construction was based nor to discuss the rather strange consequences to which in *Olive v. Paynter* (4), the decision in *Lowther v. Clifford* (3) was held by this court to lead. In the present case, the question of substance is whether or not the necessary condition for the making of a claim to compensation for disturbance was satisfied, namely, the quitting of the holding in consequence of the notice. Nowhere in the Act is this question referred to arbitration, and the result in our opinion necessarily follows from *Lowther v. Clifford* (3), that it does not fall within s. 16, sub-s. 1, as construed by this court. The Lord Ordinary in *Hendry v. Walker* (5) (referred to above) decided that a question which was on all fours with the present question, fell outside the corresponding provisions as to arbitration in the Scottish Act, and he found support for this view in an earlier decision of the Court of Session in *Donaldson's Hospital v. Esslemont* (6).

In feeling ourselves bound to decide as we do, we do not ignore the decisions in *Cave v. Page* (1) and *Mills v. Rose* (2) ;

(1) [1923] W. N. 178.

(2) [1923] W. N. 330.

(3) [1927] 1 K. B. 130.

(4) [1932] 2 K. B. 666.

(5) (1927) S. L. T. 333.

(6) 1925 S. C. 199.

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but as the point was not considered by the court in either of those two cases we cannot regard them as prevailing against the decision in *Lowther v. Clifford* (1). We need say no more upon the question of jurisdiction save that in our opinion, the state of the authorities, in the absence of an authoritative decision by the House of Lords, calls for the attention of the legislature, whose apparent object to secure a cheap and simple procedure seems, through the inadequacy of the language used, to have been singularly frustrated.

In the result, the appeal is dismissed with costs.

Appeal dismissed.

Solicitors for the landlords: *Sharpe, Pritchard & Co., for H. Oswald Brown, Clerk to the Norfolk County Council.*

Solicitors for the tenants: *Tarry, Sherlock and King, for Blyth and Hornor, Norwich.*

(1) [1927] 1 K. B. 130.

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17, 18, 21,
22, 23, 24,
25, 28, 29,
30;

May 1, 2, 5,
6, 7, 8;
June 3.

Scott,
Tucker and
Asquith L.JJ.

SAME v. DAMANT.

Negligence—Stranding of oil tank-ship—Salvage by Naval Salvage Section—Loss of ship and cargo by fire—Failure by salvors to take reasonable precautions against fire—Damages—Proceedings by ship and cargo owners against Admiralty by petition of right—Whether petition of right lies against the Crown when acting as salvor—Merchant Shipping (Salvage) Act, 1940 (3 & 4 Geo. 6, c. 43), s. 1, sub-s. 1.

The Merchant Shipping (Salvage) Act, 1940, which entitles the Crown to claim salvage remuneration for salvage services rendered by or with the aid of any ship, aircraft or other property belonging to His Majesty, does not impose a vicarious liability on His Majesty for the negligence of his officers and servants in the course of such services. In the absence of proof of a contract a petition of right will not lie against the Crown when acting as salvor.

APPEALS from decision of Atkinson J.

On May 9, 1943, the tank steamship *Delphinula*, when about to enter the harbour of Alexandria, in the course of a voyage from Haifa with a cargo of benzene, stranded near

the Great Pass Beacon and attempts to tow her off were unsuccessful. Control of the salvage operations was then taken over by the Fleet Salvage Section at Alexandria, and in view of the urgency of the matter the defendant, Captain Damant, R.N., who was then Superintendent of Salvage at the port, decided to lighten the vessel by forcing the cargo out through the bottom of the vessel by means of compressed air. In these circumstances considerable quantities of benzine collected on the surface of the sea, and by some means (a spark or flame from one of the tugs standing by was suggested) this oil became ignited, setting fire to the ship, which ultimately became a total loss. Much of her cargo was also lost, and there was serious loss of life on the tugs.

The owners of the *Delphinula* and her cargo brought an action in tort against Captain Damant, as the defendant nominated by the Admiralty, and also proceeded against the Admiralty by petition of right. On July 18, 1946, Atkinson J. dismissed the petition, but gave judgment for the plaintiffs against Captain Damant on the ground that he had failed to take reasonable precautions to minimize the danger of fire, and awarded the plaintiffs damages. Both sides appealed, but the case is only reported on the question whether, in the circumstances, a petition of right would lie against the Crown.

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Devlin K.C. and *Knox Cunningham* for the suppliants: The ancient commonlaw remedy of the subject against the Crown by means of a petition of right is not limited to claims based on contract; the remedy is open to a plaintiff, suing on any claim which is not one for damages in tort. The relief here claimed is not for damages in an action for tort, but for breach of duty as salvor. Such a proceeding does not come within the common law bar, based on the maxim "the King can do no wrong"—i.e., civil wrong, as it is called in some of the cases. If a servant of the Crown voluntarily assumes an obligation for reward and then commits a breach of that obligation, that is not a wrong in the sense contemplated by the maxim. In effect, the liability is for breach of contract. Though not very fully explained in the cases, a breach of contract is not such a wrong. It cannot be said that the Merchant Shipping (Salvage) Act, 1940, which gives to the Crown the right to claim salvage, imposes this obligation on the Crown; but this Act places the Crown, where salvage services are rendered by or with the aid of any ship belonging to the Crown,

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in a position to claim salvage for these services. The Crown, therefore, is empowered to assume the obligations of a salvor, for breach of which, it is submitted, a petition of right will lie. The Crown here has accepted a relationship imposed by the law maritime. The obligation is in the same class as that imposed by contract. The issue is whether the demurrer, that no petition of right will lie for breach of duty as a salvor, can be sustained; and that question has never been expressly decided. Sir George Stuart Robertson K.C. in 1933 (after the date of publication of his own work on the Law and Practice of Civil Proceedings by and against the Crown (1908)) stated the case where a petition of right does not lie in para. 1177, at p. 691, of vol. 9 of Halsbury's Laws of England (2nd ed.) under the title "Crown Practice": "a petition of right will not lie for "damages for tort alleged to have been committed either by "the Crown or by a servant of the Crown acting by the Crown's "authority." *Canterbury (Viscount) v. Attorney-General* (1). *Tobin v. The Queen* (2) and *Feather v. The Queen* (3) cited. The subject was most exhaustively examined in *Tobin v. The Queen* (2). Throughout the judgment of the court, delivered by Erle C.J., emphasis is laid on the principle that the Crown is not liable for tortious acts. See especially at pp. 353 and 359, 362 and 366. But a petition of right does lie against the Crown for damages for breach of contract, and a breach of duty as salvor is akin to a breach of contract. Where an act by a servant of the Crown is both a breach of contract and a tort, it is submitted that a petition of right lies. The relationship between a salvor and the owner of the ship salvaged is contractual or quasi-contractual; it is not a mere personal connexion, such as that between neighbours. It would be absurd if when the Crown claims for services as a salvor, the defendants could not counterclaim. [Tucker L.J. : I ask myself: Is this a claim in tort? If it is, a petition of right will not lie. The definition of a tort in Salmond's Law of Torts (10th ed.) at p. 13, is: "a civil wrong for which the "remedy is a common law action for unliquidated damages, "and which is not exclusively the breach of a contract or the "breach of a trust or other merely equitable obligation."] Ex hypothesi, the Crown cannot commit a tort. A person suing the Crown is suing for the breach of some duty—in this case a breach of duty as a salvor. Stuart Robertson, in his

(1) (1843) 1 Ph. 306.

(3) (1865) 6 B. & S. 257.

(2) (1864) 16 C. B. (N. S.) 310.

Civil Proceedings Against the Crown, p. 341, under the heading "Mixed contract and tort," says that where the claim under a petition of right is based on mixed contract and tort, if you can bring the action both on contract and tort, and can show a breach of contract, the petition will lie. Assuming, for the purpose of this part of the suppliant's argument, that the court is satisfied that a breach of duty by the salvor is a breach of a quasi-contract, then the petition will lie.

[Scott L.J. You are submitting that a claim can be brought in contract proper. Was there any contract between the suppliants and the salvors under which the latter contracted to save the ship?]

Our main argument is that there was a breach of contract as salvor. If we cannot establish that, then we submit that a breach of duty as salvor is a breach of a quasi-contract.

[Scott L.J. I cannot see any evidence of contract because the moment anything was done to assist the ship, it was done by the Admiralty as a salvage operation. When the ship asks for assistance it looks as if there is a contract, but it is essentially salvage.]

It is conceded, of course, that it was a salvage operation but that does not prevent there being a contract. It depends in each case whether there was a consensus. When you get, as in this case, the head of the salvage section boarding the ship and stating what he proposes to do, and the master assenting, there is material from which a contract can be inferred.

[Asquith L.J. What is the consideration, on the facts of this case?]

It would be such award as the salvor may get. The remuneration depends on success. That does not exclude a contract. (Kennedy's Civil Salvage, 3rd ed., pp. 270, 272.)

[Tucker L.J. If the observations in *The Hestia* (1) are right I do not see how you can argue that this is not a claim in tort.]

[Scott L.J. Referred to *The Bold Buccleugh* (2).]

Plainly there is there a right independent of contract, but there is nothing to prevent the parties making a contract if they choose. It is a question of fact.

[Scott L.J. As the Crown formerly had no right to claim a salvage award, but was under a national duty to render help, where do you get the incipient data for contract between the Crown and the owner of the salvaged ship?]

(1) [1895] P. 193.

(2) [1851] 7 Moo. P. C. 267, 285.

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In our submission the Crown always made a contract for salvage services.

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[Scott L.J. I think the authorities are against that proposition. See *The Valverda* (1).]

Since the Merchant Shipping (Salvage) Act, 1940, the Crown has been completely free to make a salvage contract like any private individual.

[Scott L.J. Only to make a salvage agreement.]

If the Crown wanted to rely on the point that a contract could not be made it should have been pleaded.

[Tucker L.J. You have to show that the duty of the Crown arises from contract, but it seems to me it arises from salvage relations.]

There is a quasi-contractual duty on the salvor to use due care, and failure to do so may be a breach of that quasi-contractual duty and it may be a tort. If the Crown has been guilty both of a breach of duty and tort, then it can be sued by Petition of Right. The court is invited to say that the principle to be applied where there is a breach of duty as salvor and also a tort is the same as the principle which would be applied where there is a breach of contract which is also a tort.

[Scott L.J. Prior to the Merchant Shipping (Salvage) Act of 1916 the Crown could not be sued for negligence in carrying out salvage. Did that Act make any difference in that respect?]

Yes. In certain circumstances the Crown could create the relationship of salvage between itself and the subject, and that creation put upon the Crown certain rights and certain duties. Just as the Crown could enforce those rights so it was subject to those obligations.

[*Windsor and Annapolis Ry. Co. v. The Queen and Others* (2); *Brocklebank v. The King* (3); *Attorney-General v. De Keyser's Royal Hotel* (4), referred to.]

Sir Wm. McNair K.C., Naisby and J. B. Hewson for the Crown. The suppliant breaks down on his first proposition, namely, that a petition of right is a form of relief which allows any action which is not founded in tort. That puts the matter too high. In *Windsor and Annapolis Ry. Co. v. The Queen* (2) the Privy Council approved the classic definition laid down by Cockburn C.J. in *Feather v. The Queen* (5), as follows: "We concur

(1) [1938] A. C. 173.

(4) [1920] A. C. 508, 517, 523.

(2) (1886) 11 App. Cas. 607, 530, 545, 555, 580.

608, 609, 613.

(5) 6 B. & S. 257, 294.

(3) [1925] 1 K. B. 52.

" with that court [Common Pleas] in thinking that the only cases in which the petition of right is open to the subject are, where the land, or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution . . . or where a claim arises out of a contract . . ." Therefore, unless the suppliants can establish in this case a breach of contract the petition fails. Atkinson J. disposed of that matter in these few words: " I do not think any contract can be extracted from the circumstances of this case, and therefore there is no basis for a claim based upon contract." That conclusion is unassailable. Express contract is not claimed and there is no ground for finding an implied contract. In any view the present claim does not fall within the scope of a petition of right as laid down by Cockburn C.J. Salvage springs from the maritime law and is in no way dependent on contract. If a private person saves Crown property there is no claim to an award by way of petition of right or in any other way. Remuneration is given by ex gratia grant: see Kennedy's Civil Salvage, 3rd ed., p. 77. (Observations of Halsbury L.C. in *Young v. Steamship Scotia* (1) also referred to.) The Merchant Shipping (Salvage) Act, 1940, merely removed the bar imposed by s. 557 of the Merchant Shipping Act, 1894, and enabled the Crown to put forward a salvage claim. It states in terms that in so doing the Crown has the same rights and remedies as any private salvor; it does not deal with the rights of owners of salvaged property against the Crown. Those rights are left to be dealt with at common law. If at common law the King is not responsible for acts of negligence committed by his officers and servants there is nothing in the Act of 1940 which imposes that vicarious liability on him. When the courts use the maxim " the King can do no wrong," as Lord Halsbury said in *Windsor and Annapolis Ry. Co. v. The Queen* (2), they are saying that the King cannot be held liable for a civil wrong. There is nothing in that which suggests that His Majesty can be held liable for any wrong other than a contractual wrong. Even assuming that the relationship between salvor and salvaged property is a relationship which has in it some element of contract or quasi-contract, the point remains, is this claim based on tort, and on that point considerable assistance may be obtained from cases arising under the County Courts Act,

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(1) [1903] A. C. 501, 504.

(2) 11 App. Cas. 607.

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1934, s. 47. The court has to look at the substance of the matter and ascertain whether it is a breach of contract or a breach of duty. (*Turner v. Stallibras* (1) also referred to).

Knox Cunningham in reply.

Cur. adv. vult.

June 3. THE COURT, having dismissed the appeal of Captain Damant, as to liability, but reduced the damages awarded, TUCKER L.J. read the judgment of the court on the petition of right which had been written by SCOTT L.J. We will now deal shortly with the petition of right, although our judgment in the action against Captain Damant makes it only contingently relevant. The petition alleges first a contract (the opening allegation of para. 15) and secondly, as an alternative, a duty as salvor to use reasonable skill and care. In the further alternative there is alleged in para. 17 an express or implied agreement to indemnify the suppliants against loss. We see no trace of any such contract, or express or implied agreement, in the admitted facts of the case and are therefore against the suppliants on those claims.

It remains to consider the contention that a petition of right lies against the Crown when acting as salvor. By our unwritten law, whether it is called "The common law" in its widest sense, or Admiralty law, the Crown had as salvor no rights; see *The Valverda* (2). Whether when acting gratuitously as parens patriæ in performance of a constitutional duty to the nation at large, and therefore to all His Majesty's liege subjects, the King could incur a liability for negligence committed by the Crown servants has never been considered by the courts and was not argued before us, but we assume that the maxim that the King can do no wrong would apply a fortiori. There is only one aspect of the claim which we think deserves consideration, and that is the true interpretation of the Merchant Shipping (Salvage) Act, 1940, s. 1, sub-s. 1, which is as follows: "Where salvage services are rendered by "or with the aid of any ship, aircraft or other property "whatsoever belonging to His Majesty, His Majesty shall "be entitled to claim salvage for those services, and shall have "the same rights and remedies in respect of those services as

(1) [1898] 1 Q. B. 56.

(2) [1938] A. C. 173.

"any other salvor would have had if the ship, aircraft or property had belonged to him." It is clear that if persons in the employ of any "other salvor" were guilty of misconduct the reduction in value of the salvaged property thereby caused would be taken into consideration in the decision upon the amount of the salvage award, and also, if we are right in the preceding judgment, that a claim would lie on counterclaim or by cross-action or even independent action for damages. Is a comparable right of claim vested by the sub-section in the owner of the subject-matter of the salvage services where the services are rendered by the Crown under the sub-section? In other words, does the enactment which confers on the Crown the right of claim also impose a statutory liability where the res is not salvaged? In justice it should, but is that a liability we can construe out of the words used, or is it merely a just corollary to the main enactment which was intentionally or unintentionally omitted by Parliament? The maxim that the King is not bound by a statute unless named cannot apply simpliciter to the interpretation of a statute where he is named; but on the whole, though not without a little doubt in the mind of one of us, we think it would be wrong to read that liability into the sub-section.

We treat the possible implication in the statute of a duty as the only alternative basis for a petition of right, because we do not think that one can exist at common law. Mr. Devlin invited us to say that the cause of action, if not in implied contract was also not in tort. Even if, as the argument assumes, the dichotomy between contract and tort is not absolute, and there are causes of action which sound in neither, we should hold that an action against a salvor for negligence or misconduct clearly sounded in tort. Apart from this, the following passage (approved by the Privy Council in *Windsor and Annapolis Ry. Co. v. The Queen, etc.* (1)), from *Feather v. The Queen* (2) seems fatal to the suggestion of a common law liability: "We concur with that court (the court of Common Pleas) in thinking that the only cases in which the petition of right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the Crown or to the public service."

(1) 11 App. Cas. 607, 614.

(2) 6 B. & S. 257, 294.

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This enumeration purports to be exhaustive, and the present claim cannot be brought within any of the enumerated heads. Without the implied term in the sub-section we must, therefore, uphold the Crown's demurrer, and dismiss the petition with costs.

Solicitors for suppliants : *Waltons & Co.*
Solicitor for Crown : *Treasury Solicitor.*

A. W. G.

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July 1, 2.

THOMSON AND ANOTHER v. RATING AUTHORITY FOR
BOROUGH OF BECKENHAM.

Lord Goddard
C.J.,
Atkinson and
Lewis JJ.

Rates and rating—General rate—Non payment by ratepayer—When rate becomes due and payable—Recovery by distress warrant—Poor Relief Act, 1601 (43 Eliz. c. 2), s. 4—Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), s. 2.

A rate is due and payable as soon as the rate is made and published; and if a ratepayer refuses to pay the rate after it has been demanded of him the local authority can apply for a distress warrant against him, either before or after the period for which the rate was made has expired.

CASE stated by justices for the county of Kent.

At a court of summary jurisdiction sitting at Bromley a complaint was preferred by the respondent, the Rating Authority for the Borough of Beckenham, against the appellants, George Wilfred Russell Thomson and Nora Elizabeth Frances Thomson, that they were persons duly rated and assessed to the general rate for the borough of Beckenham in and by a rate made on September 23, 1946, for the half-year ending March 31, 1947, in the sum of 16*l.* 15*s.* 5*d.* and that they had not paid the same or any part thereof, but had neglected or refused so to do, which complaint was heard on February 27, 1947, when the justices determined that the appellants were jointly rated and assessed to the general rate in the sum mentioned and that the appellants, having neglected or refused to pay the said sum for the space of seven days, a warrant of distress of their goods and chattels should be issued in respect of the said sum and the sum of 2*s.*, being the costs incurred by the respondent in obtaining the said warrant.

The justices on the application of the appellants stated the following case for the opinion of the High Court. Upon the hearing of the complaint the following facts were proved or admitted. The rate for the half-year ending March 31st, 1947, was duly made and published on September 23, 1946, and the appellants were assessed thereto jointly in the sum of 16*l.* 15*s.* 5*d.* Demand for the payment thereof was made on October 10, 1946, and, as payment was refused, on February 11, 1947, a summons was issued commanding the appellants to appear before the justices to show cause why they had not paid. At the hearing the appellants raised (among other contentions, which do not call for report) the contention that the rate was not payable until after the expiration of the period for which it was made.

The justices were of opinion that when a general rate had been made and published it was due and payable forthwith and if the person rated had neglected or refused to pay the amount thereof for seven days after the same had been demanded of him a warrant of distress might be issued to recover the sum so due, together with the reasonable costs incurred by the rating authority in obtaining the warrant.

The justices therefore held that the amount of the said rate was due from and payable by the appellants jointly and that a warrant of distress should be issued in respect of the same, together with the sum of 2*s.*, the costs incurred in obtaining the said warrant.

The question for the opinion of the High Court was whether upon the above statement of facts the justices came to a correct determination and decision in point of law.

J. W. Borders for the appellants. The question is whether a rate is payable when it is made and published or after the period for which the rate was made has expired. *Reg. v. Price* (1) is cited in Halsbury's Laws of England (2nd ed.), vol. 27, para. 956, as an authority for the proposition that a rate becomes payable as soon as it has been made and published, but it is submitted that is not so. A rate is made to pay for services which are provided by the local authority, and in the absence of a special provision payment only becomes due after the services have been rendered. In *Davis v. Burrell* (2) Jervis C.J. said that when a rate is made and published it is the duty of the party assessed to seek out the

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(1) (1880) 5 Q. B. D. 300, 301.

(2) (1851) 10 C. B. 821, 826.

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collector and to pay it and he pointed out that the statute 43 Eliz. c. 2 requires a personal demand before the rate can be distrained for. The question in that case was whether when a lessee covenants to pay rates and taxes a demand was necessary to constitute a breach so as to entitle the lessor to avail himself of the proviso for re-entry. Holt C.J. decided in *Tracy v. Talbot* (1) that "a distress could not be taken for "a quarter's rate before the quarter was ended." Up to the passing of the Rating and Valuation Act, 1925, a general rate was collectable as soon as it was made, but a poor rate under the Poor Relief Act of 1601 could only be collected at the end of the period for which it was made. Now under s. 2 (3.) of the Rating and Valuation Act, 1925, every general rate "shall be made, levied and collected, and shall be recoverable, in "the same manner in which at the commencement of this "Act the poor rate may be made, levied, collected and "recovered." In *Sweetman v. Guest* (2) Cockburn C.J. pointed out that a distress warrant was not an order to pay money. The rate was the order to pay. That was all that that case decided. It was decided in *Gill v. Mellor* (3) that there is no requirement in law that a demand for payment of the rate must be made within the year for which the rate was made. Under the statute 43 Eliz. c. 2 there was no provision that rates might be collected in advance: if that had been the intention of the legislature the Act would have said so, as was provided in the Waterworks Clauses Act, 1847, by s. 70, and in the Public Health Act, 1936, by s. 130. [Shaw's Parish Law, Carter on Poor Law, Foley on Poor Law, Burn's Justice of the Peace and Dalton's Justices were also cited.]

Squibb for the respondents. The argument for the appellants is based upon the Poor Relief Act, 1601 (43 Eliz. c. 2). By s. 2 of that Act overseers at the end of their year of office have to make and yield up a true and perfect account of all moneys received by them or rated and not received and pay over to the newly-appointed overseers such sums of money as shall be in their hands, and if an overseer refuses to account he may be committed to prison until he makes a true account. The observation of Holt C.J. in *Tracy v. Talbot* (1) that "a distress "could not be taken for a quarter's rate before the quarter "was ended" was a mere dictum. The jury in the case protested and said that the custom was otherwise, and there-

(1) (1704) 2 Salk. 532.

(2) (1868) 32 J. P. 212, 214.

(3) [1924] 1 K. B. 97.

is a footnote to the report to the effect that there is a decision to the contrary effect in 1 Bott, 3rd ed., 207. [He was stopped.]

Borders replied.

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LORD GODDARD C.J. This case comes before us in this way : Mr. George Wilfred Russell Thomson, who is a solicitor, and one of the appellants, and his wife, were found by the justices of Beckenham to be " persons duly rated and assessed " to the general rate for the said borough of Beckenham in " and by a rate made on September 23, 1946, for the half-year " ending March 31, 1947, in the sum of 16*l.* 15*s.* 5*d.*" and Mr. Thomson and his wife did not pay the comparatively small amount, preferring apparently to raise points, which no doubt they considered to be of high juristic principle, but which, if effect were given to them, would upset the whole practice in connexion with the payment of rates, which has been in force ever since the year 1601, when the statute 43 Eliz. c. 2 was passed.

The point that is taken is that a distress for rates cannot be levied until the expiration of the period for which the rate was made. A rate is made and allowed by justices and thereupon, as I think has been always understood to be the law, the rate becomes due, and if any authority is required for the proposition, which I thought every ratepayer in the country knew, it is to be found in *Reg. v. Price* (1), where Cockburn C.J. said : " The rate itself is the order," that is, the order to pay.

The statute 43 Eliz. c. 2, which is the foundation of the law of rating, provides by s. 4 " it shall be lawful as well for the " present as subsequent churchwardens and overseers, or any of " them, by warrant from any two such justices of peace as is " aforesaid, to levy as well the said sums of money and all " arrearages, of everyone that shall refuse to contribute " according as they shall be assessed, by distress and sale " of the offender's goods." Then the section, having said " as well the said sums of money and all arrearages," goes on to say, " as the sums of money or stock which shall be behind " upon any accompt to be made as aforesaid, rendering to the " parties the overplus."

If one turns back to the second section of the Act, one finds that the overseers at the end of their period of office, which lasts for one year, shall render an account to the justices showing

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receipts of money and expenditure and money they have in their hands. I think Mr. Squibb's point is right, that these words "as the sums of money or stock which shall be behind upon any" "account to be made as aforesaid," really show that distress can be levied not only against the defaulting ratepayers but also upon overseers and churchwardens who have not handed over any money remaining in their hands at the end of the accounting period.

I will mention two other cases. It appears that in the case, of *Tracy v. Talbot* (1), which was decided in 1704, Holt C.J. in deciding a case which related only to the question whether a general warrant made before a rate was a lawful warrant under which the overseers could distrain for a current rate, said that "a distress could not be taken for a quarter's rate" "before the quarter was ended." That was an observation which was not necessary for the decision of the case. It seems to have caused some surprise at the time it was made, because the jury before whom the case was tried appear immediately to have protested and said that the custom, by which I suppose they meant the practice, was otherwise, and it appears in another report that Holt C.J. resiled from the position he had taken up, and in Bott's Poor Law a note is contained of a subsequent decision which was not in accordance with the Chief Justice's observation.

Really, the point so far as this Court is concerned is put beyond all doubt by the case of *Davis v. Burrell* (2), in which Jervis C.J., who was a very great authority on all matters relating to poor law and matters of that description, said: "The question resolves itself into one of fact. If the rates were due, and were not paid, the defendant Burrell was lawfully in possession of the premises at the time the plaintiff made the forcible attempt to get in. When a rate is duly made and published, it is the duty of the parties assessed to seek out the collector and to pay it." In other words, the Chief Justice is laying down there in the clearest possible terms that a rate is due and payable at the moment it is made, and that, I think, has been the general understanding of every ratepayer and every local authority in this country, at any rate for a period of two hundred years, and if there is any doubt about it, that doubt had better be removed at once. This court has no hesitation in laying down that as soon

(1) 2 Salk. 532.

(2) 10 C. B. 821.

as a rate is made and published the rate is payable. If the rate is due and payable when it is made, it follows that if the ratepayer does not pay a distress warrant can be applied for, and that was done in this case. Naturally, local authorities do not at once apply for distress warrants; they only apply for distress warrants against recalcitrant ratepayers who refuse to pay, and they can do it if they like before the period for which the rate is made has expired or after it has expired and that has been shown by the recent case of *Gill v. Mellor* (1). In my opinion the justices were fully entitled to issue the warrant when they did.

That is the only point of substance which appears in this case. The court has listened to a very interesting argument by Mr. Borders on this point, which showed great industry in reading up all the old law of rating, but it seems to me the point is beyond doubt, and the appeal is dismissed.

ATKINSON J. There are before us two text-books in which it is said quite plainly that a rate becomes payable as soon as it has been made and published, Burn's Justice of the Peace and Ryde on Rating. Then there are the cases referred to by my Lord; there is the case of *Reg. v. Price* (2), where Cockburn C.J. said that the rate itself is the order. *Gill v. Mellor* (1), which has just been referred to, seems to me to put the matter beyond argument. The contention there was that the rate could not be demanded after the year for which the rate was made had expired, but it was accepted that it could be demanded during the year.

I read the two sections referred to in the Act of 1601 as meaning this, that the outgoing overseers had to be ready with their accounts in four days. In those accounts they had to state what they had received, and what they had not received; and the next section gives the new overseers power to recover those rates which are shown in the accounts as unpaid, to recover them as arrears. It seems to me to be treating rates which are unpaid as being in arrear, the "sums of money which shall be behind upon any account," that is, rates which the account shows have not yet been received, can be recovered by new overseers as being behind. In other words, they are already in arrears. I have felt for some time that the matter was too clear for argument.

(1) [1924] 1 K. B. 97.

(2) 5 Q. B. D. 301.

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LEWIS J. I agree, and have nothing to add.

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Appeal dismissed

Solicitor for appellants: *G. W. R. Thomson.*
Solicitor for respondents: *C. Eric Staddon, Town Clerk,*
Beckenham.

R. F. S.

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GOODMAN v. SERLE.

July 8, 14.

Lord Goddard
C.J.,
Macnaghten and
Lynskey JJ.

London (Carriage)—Hackney—Motor cab—Drive of more than six miles—Proper fare—Agreement for payment of certain sum—Whether agreement lawful—London Hackney Carriage Act, 1831 (1 & 2 Will. 4, c. 22), s. 43—London Hackney Carriage Act, 1853, (16 & 17 Vict., c. 33), ss. 7, 17—Metropolitan Public Carriage Act, 1869 (32 & 33 Vict., c. 115), ss. 9, 15—London Cab Order, 1934 (St. R. & O. 1934, No. 1346), regs. 34, 40.

A taxi-cab driver, who was hired within the Metropolitan Police District to drive his motor cab a distance beyond six miles, made an agreement with the hirer that he should be paid a certain sum which was more than that shown by the taximeter as being the proper fare for that distance. He was charged with and convicted of the offence of demanding more than his proper fare. On appeal:—

Held, that the fares fixed by the Secretary of State by the London Cab Order, 1934, apply only to hirings for a journey not exceeding six miles, and if a fare desires to be carried beyond that distance, the taxicab driver is at liberty to make a bargain for an agreed sum without regard to the fares prescribed by the order as shown by the taximeter.

CASE stated by the Appeal Committee of Middlesex court of quarter sessions.

An information was preferred by the respondent, Leslie Serle, a sergeant in the metropolitan police, under s.17, sub-s. 1, of the London Hackney Carriage Act, 1853, s. 15 of the Metropolitan Public Carriage Act, 1869; and the London Cab Order, 1934, against the appellant, Samuel Goodman, that he, being the driver of a certain motor cab, did on July 16, 1946, demand more than the proper fare. Upon the hearing of the information on July 30, 1946, at the

Tottenham magistrates' court, the appellant was convicted of the said offence and fined. The appellant on December 17, 1946, appealed against his conviction to the Appeal Committee of the County of Middlesex quarter sessions, which court dismissed the appellant's appeal, but at the request of the appellant stated the following case for the opinion of the High Court.

Upon the hearing of the appeal the following facts were proved or admitted. The appellant was a licensed motor-cab driver residing at Bow, London. At 10.15 a.m. on July 16, 1946, the appellant was plying for hire with his motor-cab at the cab rank at East India Dock Road, Poplar, London, E.15. The appellant was hired by Mrs. Doris Ryan to drive from the said cab rank to Mile End Hospital, Poplar, and thence to her home at 12 Beechfield Road, Finsbury Park, London. The total distance of the said hiring was in excess of six miles. It was orally agreed between Mrs. Ryan and the appellant at the hospital that the charge for the hiring should be 12s. It was an implied term of the agreement that the appellant and Mrs. Ryan should disregard whatever amount was shown on the taximeter of the said motor-cab. The appellant drove Mrs. Ryan in his cab from the hospital to 12 Beechfield Road, and on arriving there Mrs. Ryan said to the appellant "How much?" and the appellant answered "You know what the agreement over the telephone was, 12s." Whereupon Mrs. Ryan paid to the appellant the sum of 12s. The amount shown on the taximeter was 6s. 6d.

On the part of the appellant it was contended that the hiring being beyond a distance of six miles it was lawful for the appellant to agree with Mrs. Ryan a fare of 12s. for the hiring.

On the part of the respondent it was contended that the making of the said agreement was unlawful. The Appeal Committee's attention was directed to *Ely v. Godfrey* (1).

The Appeal Committee, being of opinion that the making of the agreement was contrary to s. 43 of the London Hackney Carriage Act, 1831, dismissed the appeal.

The question for the opinion of the court was whether on the facts as stated above the Appeal Committee came to a correct determination and decision in point of law.

Gerald Gardiner and *O. S. Macleay* for the appellant.

(1) (1922) 86 J. P. 82.

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The question for decision is whether the driver of a London hackney carriage who is required to drive the hirer of his cab more than six miles can make an agreement for a special fare. Section 4 of the London Hackney Carriage Act, 1853, prescribes the fares which may be demanded for the hire of a hackney carriage. Section 7 provides that the driver of a hackney carriage may be required to drive a distance not exceeding six miles from the place where the carriage was hired, and s. 17 made the driver of a hackney carriage liable to a penalty if he demanded more than his proper fare. Section 9 of the Metropolitan Public Carriage Act, 1869, provided that the Secretary of State might make regulations "for fixing the rates of fares, as well for time as "distance, to be paid for hackney carriages"; but this Act again contained a restriction that no hackney carriage shall be compelled to take any passenger a greater distance for any one drive than six miles. Section 1 of the London Cab and Stage Carriage Act, 1907, provided that the Secretary of State should have power by regulations made under s. 9 of the Act of 1869 to fix the fares to be paid for the hire in London of cabs fitted with taximeters. The Secretary of State, in pursuance of those powers, made the London Cab Order, 1934, reg. 34 of which provided that "the driver of a cab "shall not be compelled to accept a hiring for a distance of "more than six miles" and reg. 40 prescribed the fare payable for the hire of a motor-cab. Section 43 of the London Hackney Carriage Act, 1831, provided that "no agreement whatever "made with the driver of any hackney carriage for the payment "of more than his proper fare . . . shall be binding on the "person making the same" and imposed a penalty on the driver demanding such excess fare, and the person paying such excess fare might recover the sums paid beyond the proper fare. Section 44 however provided that "it shall be "lawful for any person to require the driver of any hackney "carriage to drive such hackney carriage, for a stated sum of "money, a distance in the discretion of such driver." The Appeal Committee of quarter session decided this case as being an infringement of s. 43, but the question is what is the proper fare. Though a taxi-cab driver may not make an agreement for an ordinary fare the question still remains what is the proper fare for a distance above six miles. There is no reported decision on the point. There was a conflict of opinion expressed in *Ely v. Godfrey* (1). Under by-laws made under powers conferred

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by the Salford Improvement Act the driver of a hackney carriage might be compelled to take passengers not exceeding three miles beyond the boundary of the borough. Ivory J. thought that the moment the cab went beyond that distance there was no rate of fare prescribed by the by-laws, whereas Salter J. was of opinion that although a driver could not be compelled to go at the prescribed rates for a further distance than three miles beyond the boundary, if he went beyond the boundary he must go at the rate prescribed by the by-laws. The intention of the London Hackney Carriage Acts was to prescribe the proper fare for a drive not exceeding six miles. If a hackney carriage driver is not entitled to make an agreement for a special fare for a drive exceeding six miles the hirers will find that the driver will not take them beyond the six miles. This case does not come within s. 43 of the Act of 1831 because it was not an agreement for more than the fare prescribed by the Act. Section 44 of that Act entitles drivers of a hackney carriage and fares to agree that the hackney carriage shall be driven for a stated sum a distance in the discretion of the driver. In the present case the driver said he would drive to the address at Finsbury Park—a distance of seven and a half miles—for the sum of 12s., which the fare agreed. That was an agreement within s. 44.

F. H. Lawton for the respondent. There was a proper fare prescribed by the London Cab Order, 1934, which may be charged within the prescribed area. That order prescribes fares for the whole metropolitan police district. The only thing that a driver can do when requested by a hirer to drive a distance exceeding six miles is to refuse to go beyond six miles. The London Hackney Carriage Act, 1831, by s. 4 applied to every carriage plying for hire within a distance of five miles from the General Post Office in the city of London, and s. 38 provided that the driver of any hackney carriage should be entitled to demand such fares as were set out in the schedule calculated by time or distance. At that time there was no provision entitling the driver of a hackney carriage to refuse to drive a fare more than six miles. A provision to that effect was first introduced by s. 7 of the London Hackney Carriage Act, 1853. Up to that time the provision as to the fares which could be demanded by the driver of a hackney carriage applied to all distances within the metropolitan police district. The fare prescribed by the schedule to the Act was at the rate of 6*d.* for every mile. The London Hackney

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Carriage (No. 2) Act, 1853, by s. 13 made it lawful for the driver of a hackney carriage within the limits of the Act, defined by s. 17 as including every part of the metropolitan police district and the city of London, to charge 1s. per mile for every mile which he shall be required to drive beyond the circumference of a circle within a radius of four miles from Charing Cross. If it had been intended to exclude from that provision journeys beyond six miles the Act would have said so. Section 9 of the Metropolitan Public Carriage Act, 1869, enabled the Secretary of State to make regulations "for fixing the rates of fares, as well for time as distance, to be paid for hackney carriages." Under the powers conferred by that section the Secretary of State made the London Cab Order, 1934. Article 2 of that order makes it clear that the area to which it was intended to apply was the city of London and the metropolitan police district. Article 34 provides that "the driver of a cab shall not be compelled to accept a hiring for more than six miles," but it does not say that if he does accept a hiring for more than six miles he may make an agreement with the hirer for any sum of money he chooses to name. Article 40 provides the scale of fares for motor-cabs which are computed partly by time and partly by distance. The words of art. 2 are all-important and must be read into art. 40 so that it shall read. "The fare payable for the hire of a motor-cab within the metropolitan police district and no other fares are permissible." Article 41 provides for extra fares which may be demanded for additional passengers or luggage, but there is no provision in that article that a driver may demand an extra fare if he drives the hirer more than six miles. A driver can refuse to drive for a distance beyond six miles, but if he accepts a hiring he must charge at the prescribed mileage rate, which is of general application to the whole of the metropolitan police district. Section 43 of the Act of 1831 prohibits the making of an agreement by the driver of a hackney carriage for the payment of more than his proper fare; s. 44 must be construed as an exception to s. 43, and does not apply to the present case. Section 44 is now obsolete because it has been replaced by s. 9 of the Act of 1869 and the London Cab Order.

Gerald Gardiner replied.

July 14. LORD GODDARD C.J. read the following judgment of the court in which he stated the facts and continued :

The whole question depends on whether the distance being over six miles the agreement to pay 12s. was a lawful agreement. There appears to be no authority on the point and it is obvious that a question of considerable importance both to cab drivers and to hirers of cabs is raised by the case and it is necessary to refer as briefly as may be to the various Hackney Carriage Acts that have been passed from time to time and to the London Cab Order of 1934. The first Act is the London Hackney Carriage Act, 1831, by s. 43 of which it is provided "No agreement whatever made with the driver of "any hackney carriage for the payment of more than his "proper fare, as the same is allowed and limited by this Act, "shall be binding on the person making the same," and provision is made for the recovery of any excess fare on a complaint made against the driver before a justice and a penalty upon the driver for demanding it. In sch. I rates and fares are laid down for the hire of hackney carriages whether by distance or time. By s. 44 it is provided: "It shall be "lawful for any person to require the driver of any hackney "carriage to drive such hackney carriage, for a stated sum of "money, a distance in the discretion of such driver, and in "case such drive shall exceed the distance to which such "person was entitled to be driven for such stated sum of "money, such driver shall not exact or demand more than the "sum for which he was so engaged to drive." The construction of this section, were it necessary for the purposes of this present case, having regard to the terms of s. 43, would present very considerable difficulties. Though still unrepealed we do not think that at the present day anyone avails himself of its provisions and for all practical purposes it may be regarded as obsolete. In any case we do not find it necessary to consider it in arriving at a decision in this appeal.

We turn next to s. 17 of the London Hackney Carriage Act, 1853. Here again, the driver commits an offence if he demands or takes more than the proper fare set forth in the schedule thereto and he also commits an offence if he refuses to drive to any place within the limits of the Act not exceeding six miles. This is the first Act in which the limit of six miles is prescribed. A further Act was passed in the same year known as the London Hackney Carriage (No. 2) Act, 1853, which gives the driver a right to make an increased charge for every mile that he is required to drive outside a four-mile radius from Charing Cross. Reading

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the two Acts together, it is clear that though a driver may be required to go beyond the four-mile radius, he cannot be compelled to undertake a journey of more than six miles.

We now come to the Metropolitan Public Carriage Act, 1869, s. 9 of which seems to us to be the most important statutory provision bearing on this case. Under that section the Secretary of State may from time to time by order make regulations for certain purposes described in the section, and among them is cl. (3.): "For fixing the rates of fares, as well "for time as distance, to be paid for hackney carriages, and "for securing the due publication of such fares." Those regulations are again subject to this restriction, that no hackney carriage shall be compelled to take any passenger a greater distance for any one drive than six miles. By s. 15 all the provisions of the Acts relating to hackney carriages which are in force at the time of the commencement of this Act are to continue in force. In 1907 the London Cab and Stage Carriage Act was passed, which was the first Act which authorized taximeters to be fixed to cabs, and on December 11, 1934, the London Cab Order was made by the Secretary of State in pursuance of this last mentioned Act and of the Act of 1869. The order prescribes the fares calculated by time and distance combined which may be taken by drivers of taxicabs, but again there is a provision in para. 34 that the driver shall not be compelled to accept a hiring for a distance of more than six miles or a duration of more than one hour.

The argument for the respondent in this case is that while there is no obligation on a cab driver to accept a hiring for more than six miles, if he does so and agrees to drive say twelve miles, and all those twelve miles are within the metropolitan police area, he is only entitled to charge the prescribed fare for the whole twelve miles; while the appellant contends that if he agrees to drive a person who hires him for a longer distance than six miles he is at liberty to make any bargain he likes as a condition of going beyond that distance. Now the offence which it is said the driver has committed was an offence under s. 17 of the Act of 1853, which is continued in force by s. 15 of the Act of 1869, that is demanding more than the proper fare. The proper fare is no longer that prescribed by the Act of 1853, but is the fare prescribed by the London Cab Order. As has been pointed out above, that order is made under s. 9 of the Act of 1869, and for this purpose that section can be read in this way: "The Secretary of State may from

"time to time make regulations for fixing the rates of fares for distance to be paid for hackney carriages, provided that no hackney carriage shall be compelled to take any passenger a greater distance for any one drive than six miles." In our opinion it follows that where the cabman has agreed to convey a fare more than six miles on one drive no fare has been prescribed and it is left to a bargain between the parties. The purpose of the Acts is to protect ordinary cab users from extortionate fares demanded by drivers who are obliged to drive them if required. Cabs which ply for hire in London streets are primarily for short distances within the area for which they are licensed, certainly for distances not exceeding six miles. There seems no reason therefore why one should hold that a bargain made between cab driver and hirer for a long distance journey for which a hired motor-car would certainly be equally and probably more appropriate should be held illegal unless there are words in the statute which compel us to do so. It is true that in the year 1831 when the Act was passed avoiding agreements to pay more than the fare prescribed in that Act, there was no distance limit laid down beyond which a driver could refuse to go. But the subsequent Acts seem clearly to contemplate that anything above six miles is to be regarded as something in the nature of an abnormal hiring. If it were laid down by this court that a driver who is hired for a long distance, which in many circumstances it might be unreasonable to oblige him to undertake, but which he might be willing to perform for a special fare, cannot make a special bargain it might well result that no taximan would ever take a fare for a greater distance than six miles or at the end of six miles would stop and tell his fare to alight as he was going to turn around to go home. We do not pretend to find the construction of these Acts at all easy, and in these days of mechanical vehicles capable of far longer journeys than the old horse cabs it might be of assistance both to the trade and to the public if the Secretary of State made an order which would put the matter beyond controversy as he clearly has power to do. But of the two possible constructions of the Acts we prefer the one which seems to us the more reasonable and the one productive of the least inconvenience and hardship both to the public and the drivers and that is to regard the fares as fixed by the Secretary of State as applying only to drives not exceeding six miles, that is to say, drives which a taxi driver who is hired is bound

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to undertake if required and, in our opinion, if a fare desires to be carried beyond that distance the taxi driver is at liberty to make a bargain without regard to the prescribed fares. For these reasons, in our opinion, this appeal succeeds and the conviction is quashed, with costs to the appellant here and below.

Appeal allowed.
Conviction quashed.

Solicitors for appellant : *Philip Conway, Thomas & Co.*
Solicitor for respondent : *Solicitor, Metropolitan Police.*

R. F. S.

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April 29.

Lord Goddard
C.J.,
Atkinson and
Oliver JJ.

LABRUM v. WILKINSON.

Road traffic—Motor car—User on road without insurance against third party risks—Conviction—Disqualification for holding a licence—Special reasons for not imposing disqualification—Holder of licence misled by insurance company—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 35, sub-s. 2.

A garage proprietor made a proposal to an insurance company for a general trade cover for all vehicles used in connexion with his trade, and he received a cover note from the company holding him insured against third party risks for any vehicle used in connexion with the motor trade, and the company undertook to tell him if they declined his proposal. There was nothing on the cover note to say that it was limited to a named driver, but the policy which was subsequently sent to him, and which he did not read, was limited to a named driver. The garage proprietor was subsequently charged under s. 35 of the Road Traffic Act, 1930, with the user of a motor vehicle on a road without there being in force a policy of insurance against third party risks; he was convicted, but the recorder of the borough held that there were special reasons within s. 35, sub-s. 2, of the Act of 1930, for not imposing a disqualification for holding a licence in that he had been misled by the insurance company into believing that he was covered in respect of his motor vehicles. On appeal :—

Held, that inasmuch as the garage proprietor received from the insurance company a cover note which told him in substance that he would get a policy in accordance with the cover note or that the company would inform him that they did not accept the proposal in accordance with his terms, and the company then issued to him a policy which was not in accordance with the cover note,

the recorder was entitled to hold that there were special reasons for not imposing the disqualification as the man had been misled.

Knowler v. Rennison, ante, p. 488 distinguished.

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CASE STATED by the Recorder of Northampton.

At a court of summary jurisdiction an information was preferred by the appellant Labrum, against the respondent Wilkinson, for using a motor vehicle on the road when there was not in force in relation to its user a policy of insurance against third party risks, contrary to s. 35 of the Road Traffic Act, 1930. The court of summary jurisdiction convicted the respondent and disqualified him for holding a licence. The respondent appealed to the Northampton quarter sessions and the recorder affirmed the conviction but held that there was a special reason within s. 35, sub-s. 2, of the Road Traffic Act, 1930, why the respondent should not be disqualified for holding a licence, in that he had been misled by the insurance company into thinking that he was covered, but on the application of the appellant stated a case for the opinion of the High Court.

The recorder found that the respondent, who was a garage proprietor, made a proposal for a general trade cover for all vehicles used in connexion with his trade to an insurance company and received a cover note, dated October 5, 1945, from the company holding him insured against third party risks for any vehicle used in connexion with the motor trade. The cover note stated that the respondent "having made a proposal to insure the undermentioned risks in respect of the motor vehicle referred to and any motor vehicle used in connexion with the motor trade is hereby held insured in respect of such risks until a policy is prepared and payment of the premium demanded, but in no case exceeding thirty days from the date hereof subject to the terms, exceptions and conditions of the company's policy for the class of risk to be covered. If such proposal be accepted by the directors a policy and a detailed certificate of insurance to run to the expiry date of the policy will be prepared in due course, but if it should be declined the liability of the company shall cease upon notice being given to the proposer or his agent and a proportionate charge will be made for the period during which the company has accepted liability under this cover note." The risks which were covered were "Third party (Damage to Property and Personal Injuries)." The policy which was subsequently sent to the respondent was, however,

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limited to a named driver. The respondent when he received the policy did not read it. The recorder was of opinion that the respondent was misled by the insurance company into thinking that he was covered by their issuing to him a cover note, his proposal being for a general cover, and then, having undertaken to tell him if they declined the proposal, sending him a policy limited to a named driver, and that these circumstances constituted, a special reason within s. 35, sub-s. 2, of the Road Traffic Act, 1930, why the respondent should not be disqualified for holding a licence.

A. P. Marshall for the appellant.

The respondent did not appear and was not represented.

LORD GODDARD C.J. In this case the proposal form has not been produced, but the recorder has found that the respondent made a proposal for a general trade cover, and it would be a very remarkable thing if a garage proprietor did not make a proposal of that nature. The respondent received a cover note from the insurance company which covered in the widest possible terms any vehicle used in connexion with his trade, whether it was being driven by himself or by anyone else. The policy however which was subsequently sent by the insurance company to the respondent was on the "named driver" basis. Motor policies may be obtained from insurance companies at a lower premium if it is warranted that the car will only be driven by a named person, and if a motor car owner takes out one of those policies he must not allow anyone other than the named driver to drive the motor vehicle. If he does allow someone else to drive, the vehicle will not be insured, and an offence against the Road Traffic Act will have been committed. It is clear that the policy which the respondent received did not conform with the cover note. There was nothing on the face of the cover note to say that it is in any way limited to a named driver. When the policy was received by the respondent he did not read it. I think the recorder has found special circumstances in this case because he was of opinion that the respondent was misled by the insurance company issuing a cover note to him and then, having undertaken to tell him if they declined the proposal, which was for a general cover, sending him a policy which was for some reason limited to a named driver.

I do not resile in the smallest degree from what I said in

Knowler v. Rennison (1) in which case the questions were very much the same as in the present case, but a judgment must always be read in the light of the facts of the particular case. It is perfectly true that I said in that case that it was the obvious duty—and I repeat it—of people to make themselves acquainted with their policies and, as I also said in that case, if they do not understand them, it is their duty to take advice.

Knowler v. Rennison (1) was also a case of a named driver policy but there was no suggestion there that the assured had made a proposal for a general cover, and had received a policy which was not a general cover—still less that he had received a cover note which had given him a general cover, and a policy which one would naturally expect would follow the terms of the cover note but which did not follow the cover note. In the present case the recorder has found that the respondent was misled into believing that he was covered. I should be sorry if it was thought that *Knowler v. Rennison* (1) had laid down that in no case where a man was misled by the contents of his policy, or, perhaps, had received wrong advice as to the legal effect of the policy, could that be treated as a special circumstance. It is not a circumstance which refers to every sort of case under the Road Traffic Act, 1930, s. 35. If the facts in the present case had simply been that the respondent, having made a proposal, received a policy and did not look at it, I should have said that the decision in *Knowler v. Rennison* (1) applied also in this case, but he received a cover note which told him in substance that he would get a policy in accordance with the cover note or the directors would inform him that they did not accept the proposal in accordance with his terms. Therefore, I think there were grounds here on which the recorder could say there was a special reason in this case because the respondent had been misled by the insurance company.

If an ignorant man who has a motor bicycle gets a policy and is puzzled by its terms and he goes to some person who it would be reasonable to suppose would be able to give him proper information about the effect of the policy and that person gives him advice which turns out to be wrong, nothing that I said in *Knowler v. Rennison* (1) was intended to cover that sort of case. That might be an excuse. In *Knowler v. Rennison* (1) the assured had made no inquiry. He had taken out a policy which covered the use of his motor cycle while he himself and no other person was driving it. He allowed a friend to drive

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the motor cycle and there was an accident. In the circumstances the assured was not insured and he said that he had not taken any steps to find out what was the effect of his policy. He had got the policy for which he had applied, and he had no reasonable ground for believing that it would cover the circumstances which actually occurred. In the present case I think there were circumstances which would lead the respondent to think that, having made a proposal for a general cover and having received a cover note giving him a general cover, he would receive a policy providing general cover. He might well be excused for not having read the policy and found out that it had not been issued in accordance with the proposal. In these circumstances I am not prepared to say that there was no evidence on which the recorder could come to the conclusion that there was a special reason in this case why the respondent should not be disqualified under s. 35, sub-s. 2, of the Road Traffic Act, 1930. I look on this as an entirely exceptional case, and the fact that it is an exceptional case is a ground for saying that there was a special reason here.

ATKINSON J. I agree. I should like to call attention to the following words in the cover note: "If such proposal be accepted by the directors, a policy and a detailed certificate of insurance to run to the expiry date of the policy will be prepared in due course, but if it should be declined the liability of the company shall cease upon notice being given to the proposer" It is not suggested that any notice was given to the proposer that the directors had not accepted his proposal. I do not know why he should be regarded as to blame, when he receives as a policy something for which he has not asked, for not looking to see whether the insurers had done what they had contracted to do. I agree with everything that my Lord has said as to the assured's duty to make sure, but in the present case the respondent was misled in the sense that he is told that the protection for which he has asked will only cease on notice being given to him. In my opinion there were circumstances in this case on which the recorder was entitled to find that there were special reasons within the meaning of s. 35, sub-s. 2, of the Road Traffic Act, 1930.

OLIVER J. I agree.

Appeal dismissed.

Solicitors for the appellant : *Perkins & Tustin, Northampton.*

R. F. S.

WILKINSON v. BARKING CORPORATION.

1947
April 15;
May 5.

Morris J.

Local Government—Employee of local authority—Superannuation—Rights of employee—Statutory tribunal to determine—Action by employee—Unconditional appearance by defendants—Plea that action not maintainable—Preliminary issue—Jurisdiction of statutory tribunal in case of ex-employee—Local Government Superannuation Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 68), s. 35.

By s. 35 of the Local Government Superannuation Act, 1937, "Any question concerning the rights and liabilities of an employee of a local authority, . . . shall be decided in the first instance by the authority concerned, and if the employee is dissatisfied with any such decision . . . shall be determined by the Minister, and the Minister's determination shall be final . . ."

The plaintiff brought an action against a local authority by which he had been employed claiming a declaration that he was entitled to an annual superannuation allowance by virtue of the provisions of the Local Government Superannuation Act, 1937. The defendants entered an unconditional appearance to the writ and by their defence pleaded that pursuant to s. 35 of the Act any question as to the plaintiff's right to superannuation was required to be determined by the Minister of Health and that the plaintiff had no cause of action. On the hearing of a preliminary issue to determine the question raised by the plea, it was contended for the plaintiff (1.) that the defendants, having entered an unconditional appearance to the writ and not having moved to set it aside, it was too late for them to demur to the jurisdiction of the court to entertain the action, and (2.) that on the language of s. 35 "an employee" therein meant an employee who was still in the employment of a local authority and that the plaintiff having ceased to be in such employment was entitled to maintain the action:—

Held, (1.) that as the defendant's plea was addressed to the capacity of the plaintiff to sue and not to the jurisdiction of the court to entertain the action, it was not open to objection, and (2.) that s. 35 was not confined to cases in which an employee was still in the employment of a local authority and that the plaintiff's rights must be determined in the first instance by the authority concerned and on appeal by the Minister.

PRELIMINARY POINT OF LAW set down for hearing before trial under Or. 25, r. 2.

The plaintiff in the action, G. H. Wilkinson, claimed a declaration as against the defendants, the Barking Corporation, that on ceasing to be employed by them on December 17, 1945, after having completed ten years service, and being at all material times incapable of discharging efficiently the duties of his employment as a parks superintendent by reason of permanent ill health, he was entitled to receive an annual

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superannuation allowance from the defendants under the provisions of s. 8, sub-s. 1 (a) of the Local Government Superannuation Act, 1937 (1). The writ, together with the statement of claim was served on the defendants on July 31, 1946, and an unconditional appearance to the writ was entered by them on August 13. By their defence the defendants pleaded that for reasons alleged therein the plaintiff was not entitled to a superannuation allowance. Paragraph 6 of the defence was in the following terms: "The defendants will rely on " s. 35 of the Local Government Superannuation Act, 1937, " and will contend that by virtue of the said section any " question of the plaintiff's right to an annual superannuation " allowance under Part I of the said Act is required to be " determined by the Minister of Health and that the plaintiff " has no cause of action." On February 21, 1947, by consent, the master made an order that the issue raised in para. 6 of the defence should be set down for hearing and disposed of before the trial, pursuant to Or. 25, r. 2.

On the hearing of the issue it was agreed that the onus was on the defendants.

Harold Williams for the defendants. The question raised by para. 6 of the defence is whether the fact that the employee is given a right of appeal to the Minister by s. 35 of the Local Government Superannuation Act, 1937, from the decision of the local authority refusing him a superannuation allowance, excludes the jurisdiction of the court to entertain an action by the employee. It is submitted on the principles laid down in *Pasmore v. Oswaldtwistle Urban District Council* (2) that it clearly does. The Earl of Halsbury L.C. said in that case:

(1) Local Government Superannuation Act, 1937, s. 35: "Any question concerning " the rights or liabilities of an " employee, or of a person claiming to be treated as such an " employee, under any of the " provisions of Part I of this " Part of this Act, or any regulations made under this Act, shall " be decided in the first instance " by the authority concerned, and " if the employee is dissatisfied " with any such decision or with

" the authority's failure to come to " a decision, shall be determined " by the Minister, and the Minister's determination shall be " final: Provided that the " Minister may at any stage of the " proceedings on the reference to " him, and shall, if so directed by " the High Court, state in the form " of a special case for the opinion " of the High Court any question " of law arising in those proceedings."

(2) [1898] A. C. 387, 394.

"The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law." Later, quoting Lord Tenterden in *Doe v. Bridges* (1) he said: "Where an Act creates an obligation and enforces the performance of it in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner." The present case falls within those statements and the plea of the defendants in para. 6 of their defence is good in law.

Malone for the plaintiff. The present action is maintainable by the plaintiff. As the defendants entered an unconditional appearance to the writ and did not seek to set it aside, so they cannot afterwards contend that the court has no jurisdiction to deal with the matter, see *Orr Ewing v. Orr Ewing* (2), *Western National Bank of the City of New York v. Perez Triana & Co.* (3), *Moore v. Gamgee* (4), *Preston and Others v. Lamont* (5), Or. 12, r. 30. Secondly, s. 35 of the Act of 1937 does not deprive the plaintiff of his right to have recourse to the court. The word "employee" in the section means a person who is being employed and not one who has been dismissed from his employment. The plaintiff here was neither an employee nor a person claiming to be treated as an employee within the meaning of the section, but a person who had long ceased to be employed. The section could not have contemplated that a person who desired to take proceedings, for example, for wrongful dismissal, after a lapse, perhaps, of four or five years, must bring his case before the local authority by which he had been employed and which would be the judge in their own case. The Act envisages a kind of domestic tribunal and provides that while persons are subject to its terms they are not to have recourse to the King's courts, but it does not prevent a person who has long ceased to be an employee from bringing an action against the local authority which had formerly employed him. This view of the section is supported by the language used in s. 40 in defining "employee" where it says that the word does not include a person whose employment "is" of a casual nature, and by that of s. 1, sub-s. 3, (c) which speaks of "the local authority, or other body, in whose employment a contributory employee

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(1) (1831) 1 B. & Ad. 847, 859.

(3) [1891] 1 Q. B. 304, 317.

(2) (1882) 22 Ch. D. 456, 459.

(4) (1890) 25 Q. B. D. 244.

(5) (1876) 1 Ex. D. 361.

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is". The use of the present tense in these cases indicates that the reference is to an employee who is still being employed and not to someone who has been an employee in the past. [He also referred to *Bank of England v. Vagliano Brothers* (1).]

Harold Williams in reply. There is no question in this case of jurisdiction, since the defendants are submitting to the jurisdiction of the court and are asking for judgment on the ground that the plaintiff has no cause of action by reason of the provisions of s. 35. All the authorities cited for the plaintiff deal with the question of the validity of the service of the writ in the actions in question, which may possibly go to the question of jurisdiction, but the defendants' plea is addressed to the capacity of the plaintiff to sue and not to the jurisdiction of the court to entertain the pleas raised in the pleadings. With regard to the second point argued on behalf of the plaintiff, it is submitted that the expressions "employee" and "contributory employee" in the Act are not used to distinguish such persons from those who have ceased to be employees or contributory employees, but as convenient words to describe various classes of persons who may be affected by the Act without reference to their particular status at the moment with which the section is dealing.

Cur. adv. vult.

May 5. MORRIS J. stated the facts and continued: The only matter which is now before me is the issue raised in para. 6 of the defence. On behalf of the plaintiff, Mr. Malone addressed two main submissions to me. In the first place, he contended that as the defendants had entered an unconditional appearance it was not open to them to plead as they do in para. 6. He urged that, having failed to move to set aside the writ, it was now too late for the defendants to take a point which he contended went to the question of the jurisdiction of the court. In the second place, he contended that s. 35 did not apply, for he submitted that the word "employee" in that section should be construed as denoting a person who is being employed and not to include a person who has been employed or one who, as the defendants contend, has been dismissed from their employment.

As to the first point, it is to be observed that the plaintiff, appearing by counsel before the master, agreed that the issue raised by para. 6 of the defence should be set down for hearing

(1) [1891] A. C. 107, 120.

and disposed of before the trial, whereas he now seeks to say that such issue is not open to the defendants. This first point taken on behalf of the plaintiff is, therefore, a point other than that agreed by counsel and ordered by the master to be set down for hearing. The plaintiff did not take any step to strike out para. 6 of the defence, nor did he ask leave to deliver a reply. It is doubtful, therefore, whether this point is now open to the plaintiff; but, as I am anxious not to deal with this matter on any narrow or rigid basis, and as I heard full arguments upon the point, I will proceed to deal with it.

Mr. Malone submitted that if the defendants proposed to rely upon the matters pleaded in para. 6 of the defence, they should have entered conditional appearance or should have taken out a summons under Or. 12, r. 30, to set aside service upon them. He argued that, after the defendants entered unconditional appearance, it became too late for them to rely upon the matters raised in that paragraph. In support of this contention he referred to and relied upon *In re Orr Ewing* (1), *Western National Bank of the City of New York v. Perez Triana & Co.* (2), *Moore v. Gamgee* (3) and *Preston v. Lamont* (4).

No doubt, as a general rule, complaint as to any irregularity in the service or issue of a writ of which defendants have knowledge cannot be raised after unconditional appearance, but no such matter here arises and, furthermore, the cases cited do not, in my judgment, establish that the defence raised in para. 6 is not open to the defendants. It is to be observed that in *Wright v. Prescott Urban District Council* (5), a plaintiff claimed a declaration that certain orders made by the defendants under the Housing, Town Planning, etc. Act, 1909, were bad in law. Before pleadings were delivered, the defendants moved for an order to stay all further proceedings in the action, on the grounds that, having regard to s. 39 of the Act, the court had no jurisdiction to review and disturb the orders and that the plaintiff's remedy was to appeal to the Local Government Board. It was also said that the action was statute-barred. Neville J. decided that the motion was premature because made before the delivery of the statement of claim.

The defendants here do not demur to the jurisdiction of the

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(1) 22 Ch. D. 456.

(4) 1 Ex. D. 361.

(2) [1891] 1 Q. B. 304.

(5) (1916) 33 T. L. R. 82.

(3) 25 Q. B. D. 244.

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court, and, indeed, if the point of law is decided in their favour, may ask the court to give judgment in their favour, but they plead that the plaintiff's proper and only remedy is the exercise of a statutory right of appeal. The plaintiff contends that the submissions made by the defendants in regard to the construction of and the applicability of s. 35 are erroneous, but the defendants do not suggest that the court has not got jurisdiction to decide these matters and, indeed, in conjunction with the plaintiff, have, as I have pointed out, agreed to an order for the trial of them as preliminary points of law. Whether some other procedure might or might not alternatively have been followed as, for example, that of applying to stay the action, does not arise for decision, since, in my judgment, the procedure that has been adopted is not open to objection.

The defence raised in para. 6 is comparable with the defences pleaded in *Pasmore v. Oswaldtwistle Urban District Council* (1). The procedure adopted in that case was that the points of law were by agreement argued before the trial of the cause. In his speech in that case the Earl of Halsbury L.C., said: "The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe v. Bridges* (2). He says: 'Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.' The words which the learned judge, Lord Tenterden, uses there appear to be strictly applicable to this case. The obligation which is created by this statute is an obligation which is created by the statute and by the statute alone. It is nothing to the purpose to say that there were other statutes which created similar obligations, because all those statutes are repealed; you must take your stand upon the statute in question, and the statute which creates the obligation is the statute to which one must look to see if there is a specified remedy contained in it. There is a specified remedy contained in it, which is an application to the proper government department."

In support of his second main contention, Mr. Malone pointed to the definition in the Act of the word "employee." The

(1) [1898] A. C. 387, 394.

(2) 1 B. & Ad. 847, 859.

definition is as follows: "'employee' means an employee "whether permanent or temporary, but does not include a "person whose employment is of a casual nature." Attention was specially directed to the word "is" in the phrase "whose "employment is of a casual nature." Mr. Malone further pointed to the provisions of s. 1, sub-s. 3 (c), which reads: "In this Act, the local authority, or other body, in whose "employment a contributory employee is, are in relation to him "referred to as the employing authority." Attention was again directed to the word "is." It was submitted that the plaintiff should not be regarded as an employee within the meaning of s. 35, and it was urged that the section has no application where questions are being considered at a time when a person has ceased to be employed.

In my judgment, these arguments are fallacious. The plaintiff admits that he was an employee up to December 17, 1945, and claims that as from that date he is entitled to receive an annual superannuation allowance. If on December 17, 1945, he was entitled to participate in the benefits of a superannuation fund it was because he was an employee. Questions have arisen whether on December 17, 1945, he was so entitled, or whether there were reasons which disentitled him. Those questions seem to me to be clearly comprehended within the opening words of s. 35 of the Act, namely, the words: "Any "question concerning the rights or liabilities of an employee of "a local authority, or of a person claiming to be treated as such "an employee, under any of the provisions of Part I or this "Part of this Act." If this is so, it follows that any such question is to be decided in the first place by the authority concerned, and if the employee is dissatisfied with any such decision, then the question is to be decided by the Minister specified by the Act.

In the course of the submissions, it was urged that matters arise in this action, and may arise in other cases, which can best be investigated and disposed of by the machinery of a trial in court, with its full opportunities for the examination and cross-examination of witnesses. It is not shown that these opportunities will be denied in any proceedings which take place on a reference to the Minister; but, whether this is so or not, these are considerations which do not arise, for they are relevant only to questions as to the policy of the legislation in question and with such questions the court is not concerned.

For the reasons which I have given, I decide the question of

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law raised in para. 6 of the defence in the defendants' favour, and there being nothing left in the action to try, it follows that there must be judgment in the action for the defendants.

Judgment for the defendants.

Solicitors for the plaintiff: *Kingsford Dorman & Co., for Hatten, Asplin, Jewers & Glenny, Barking.*

Solicitors for the defendants: *Sharpe, Pritchard & Co., for E. R. Farr, Barking.*

P. B. D.

1947
May 9.
Denning J.

WRIGHT v. BENNETT AND ANOTHER.

Costs—Taxation—Review—Refresher fees to counsel—Time occupied by mid-day adjournment—Exclusion—Counsel with noting brief at trial—Given junior brief in Court of Appeal—Cost of documents supplied to him—R.S.C. Or. 36, r. 40, Or. 65, r. 27, sub-r. 48.

Order 65, r. 27, sub-r. 48, provides that "if the total time occupied "by the trial" shall exceed the period of five hours the taxing master may allow a refresher fee for every complete period of five hours in excess of the first five hours; and Or. 36, r. 40, provides that the Associate shall make a note of "the time actually "occupied" on each day:—

Held, that the time occupied by the midday adjournment is to be excluded for the purpose of refresher fees to counsel.

Collins v. Worley (1889) 60 L.T. 748 is no longer an authority having regard to the recent amendments in the rules.

A junior counsel who was given a noting brief on the trial of the action was supplied with a copy of the documents the costs of which were disallowed by the taxing master. In the Court of Appeal the junior counsel who had conducted the case at the trial was given a leading brief as he had taken silk and the counsel who at the trial held a noting brief was given a junior brief. Both were given copies of the documents they had at the trial. The taxing master on taxing the costs in the Court of Appeal allowed the costs of the documents to the junior counsel who had held a noting brief at the trial. The documents were necessary for counsel to have in the Court of Appeal:—

Held, that the taxing master was right in allowing the costs of those documents in the Court of Appeal.

Masson Templier & Co. v. De Fries [1910] 1 K.B. 535 distinguished.

REVIEW of taxation of costs.

SUMMONS ADJOURNED into court for judgment.

The following statement of the relevant facts is substantially taken from the judgment of Denning J. The case was heard on twenty days. The associate in accordance with Or. 36, r. 40, made a note of " the time actually occupied " by the trial on each day. He recorded the very minute on which the case started on each day, the time at which the case was adjourned for the mid-day adjournment, the time at which it was resumed, and the time on which it ended on each day. His note showed that on four of the days the court sat only in the morning. On the remaining sixteen days the case was adjourned at mid-day for a time which varied from fifty to seventy minutes. These mid-day adjournments added up to a total of fifteen hours, forty-three minutes. On some of the days the judge during the interval heard pressing applications in other cases, but there was no record of the time occupied by those applications. The associate was concerned only with the precise time actually occupied by this case. The taxing master included the mid-day adjournments totalling fifteen hours, forty-three minutes for the purpose of refresher fees to counsel, that was, taking one refresher for every five hours, three refreshers more than would have been allowed if that time had been excluded.

At the trial in the court of first instance the plaintiff and one of the defendants employed both leading and junior counsel, but the other defendant employed only one junior counsel to conduct the case and another junior counsel to take a note. The counsel who had a noting brief was supplied with a copy of the documents, but the cost of those documents was disallowed on the taxation of the costs of the trial because such a counsel is not entitled to copies of documents other than the pleadings. By the time the case reached the Court of Appeal the junior who conducted the case had taken silk and was given a leading brief, and the junior who held a noting brief at the trial was given a junior brief ; and each had the documents he was given at the trial. It was necessary for each to have those documents in the Court of Appeal. In taxing the costs in the Court of Appeal the taxing master allowed the costs of the documents for that junior counsel which he had disallowed in taxing the costs of the trial.

Gilbert Dave for the plaintiff.

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Charles Fletcher-Cooke for the first defendant.*R. T. Paget* and *S. C. Silkin* for the second defendant.

DENNING J. read the following judgment. In this case the first point is whether or not the mid-day adjournment is to be included for the purpose of refresher fees to counsel. The taxing master felt that there was considerable justification for the objection to including the mid-day adjournments, totalling fifteen hours forty-three minutes, for the purpose of refreshers, but felt bound to follow the rule laid down in *Collins v. Worley* (1). That case was decided in 1889 at a time when the relevant rules were different from what they are now, and when the practice as to mid-day adjournments was very different. The report of that case discloses that in those days an adjournment for thirty minutes was considered to be a prolonged one, and that counsel could not do other work in the interval, but had to be on hand, because they did not know when the judge would return. Nowadays, a judge always announces the time at which he will resume and occasionally extends the time so as to enable counsel to do other work.

The senior taxing master at my request came and told me in the presence of the parties, what is the practice of the taxing office for the purpose of refreshers. The practice is to include the time occupied by the mid-day adjournment as part of the trial, including short applications in other cases, but that when a long application taking, say, twenty or thirty minutes is taken in the interval, the whole of the mid-day adjournment is excluded, as well as the time of the application.

In my opinion, the amendments in the rules since 1889 render *Collins v. Worley* (1) no longer of authority. The relevant rules are Or. 65, r. 27, sub-r. 48 and Or. 36, r. 40. The latest amendment was made in 1937. Previously, a refresher was payable for "every clear day"; but now "if the total time "occupied by the trial" shall exceed the period of five hours, the taxing master may allow a refresher for "every complete "period of five hours" in excess of the first five hours, and the associate has to make a note of "the time actually occupied" on each day. That wording is plain. In calculating the total time occupied by the trial the times of the actual hearing of the case in court should be taken and added together, all mid-day adjournments being excluded. This means that the practice as to refreshers is brought into line with the practice as to court

(1) (1889) 60 L. T. 748.

fees (see Fee 29). No distinction can be drawn in the relevant rules and none should exist in practice. It was suggested that I should not disturb the existing practice as to refreshers, but the relevant practice is only that which has existed since 1937, and it has never been sanctioned by judicial authority. It has not continued so long as to become authoritative and I allow the objection.

The next point is whether the costs should be allowed of certain documents for second counsel in the Court of Appeal. It is said that the taxing master should have disallowed these costs in the Court of Appeal in the same way as he disallowed them in taxing the costs of the trial, on the authority of *Masson Templier & Co. v. De Fries* (1), but that case is distinguishable. There, the party was precluded from claiming the costs of the documents by the condition under which he obtained leave to appeal to the Divisional Court. Here he prepared copy documents for use in impending litigation without any such barrier to his recovering the costs. The expense of recovering them has been shown by the event to be a necessary and proper expense in the course of the litigation; and the party ordered to pay the costs of that litigation should bear that expense. I think, therefore, that the taxing master was right in allowing them.

Order accordingly.

Solicitors for plaintiff: *H. S. Wright & Webb.*

Solicitors for first defendant: *George C. Carter & Co.*

Solicitors for second defendant: *Wilkinson, Howlett & Moorhouse.*

(1) [1910] 1 K. B. 535.

R. F. S.

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1947

July 10.

Bastardy—Corroboration—Letters from putative father produced by complainant—Whether admissible as corroboration—Evidence of association on terms of intimacy or affection.

Lord Goddard
C.J.,
Macnaghten and
Lynskey JJ.

Appeal—Preliminary objection—Case not stated by justices within

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three months of application—Delay not due to action of appellant—Jurisdiction to hear appeal—Bastardy Laws Amendment Act, 1872 (35 & 36 Vict., c. 65), s. 4—Summary Jurisdiction Rules, 1915 (St. R. & O., 1915, No. 200/L. 12), r. 52.

Where, in bastardy proceedings there is evidence that over a long period, including the time of conception, the putative father has chosen to associate with the complainant on terms of close affection and there is no evidence that she was associating with other men, material exists which justices are entitled to treat as corroboration of the complainant's evidence in some material particular, as required by s. 4 of the Bastardy Laws Amendment Act, 1872.

A complainant in bastardy proceedings cannot corroborate herself by producing a letter which she alleges was written to her by the putative father of her child.

Johnson v. Pritchard (1933) 97 J. P. N. 754 doubted, but followed.

The provision of r. 52 of the Summary Jurisdiction Rules, 1915, which requires a case to be stated by justices within three months of the application for the same, is directory and not mandatory. Where, therefore, owing to no fault on the part of the applicant, a case is not stated within the prescribed time, the court has jurisdiction to hear the appeal.

Hughes v. Wavertree Local Board (1894) 10 T. L. R. 357, and *Lane v. Rendall* [1899] 2 Q. B. 673 followed; *Gregory v. Cattle* [1943] K. B. 412, considered.

CASE STATED by justices.

On June 6, 1945, the respondent, Ada Hewitt, gave birth to a child of which she alleged that the appellant, Walter Moore, was the father. A complaint under the Bastardy Laws Amendment Act, 1872, was preferred by the respondent against the appellant before a court of summary jurisdiction, and at the hearing the following facts were proved or admitted. The respondent first met the appellant in September, 1943, and sexual intercourse took place between them on six occasions between December 26, 1943 and October 1, 1944. Two letters were produced by the respondent which she alleged had been written to her by the appellant. The letters were signed "Tone" and indicated that the writer of them was the father of the respondent's child. The respondent in her evidence stated that she had not had sexual intercourse with any other man than the appellant. On the evidence of the respondent, corroborated by other witnesses it was proved that the appellant and respondent visited cinemas, licensed houses and dances together between September, 1943 and October, 1944, that they were in the company of each other at certain

hours in the evening during the period in question and that the appellant visited the respondent's home on four or five occasions. No person had ever seen any act of intimacy between the appellant and the respondent. No evidence was given for the appellant, but it was contended on his behalf that, on the above facts, there was no corroboration in any material particular of the evidence of the respondent, as required by s. 4 of the Bastardy Laws Amendment Act, 1872. The justices were of opinion that, in view of the principle laid down in *Johnson v. Pritchard* (1), the letters produced by the respondent could not, in law, be regarded as corroboration of her evidence and they, therefore, disregarded them. They were of opinion, however, that the evidence of the other witnesses called on behalf of the respondent established that the appellant and she were seen together in such circumstances and on such terms of intimacy or affection as would corroborate the respondent's evidence and they, therefore, determined that the respondent's complaint was proved to their satisfaction in fact and in law, and made an order in her favour. On December 20, 1946, the appellant applied to the justices to state a case. Owing to no fault on his part the case was not stated until May 16, 1947, a date later than that prescribed by r. 52 of the Summary Jurisdiction Rules, 1915, and a preliminary point was taken on behalf of the respondent that the court had no jurisdiction to hear the appeal.

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Herrick Collins for the respondent. Rule 52 of the Summary Jurisdiction Rules, 1915, provides that a case must be stated by justices within three months of the date of the application for it. It is true that in *Hughes v. Wavertree Local Board* (2) and *Lane v. Rendall* (3), where a similar objection was taken, the court allowed a case stated out of time to be heard, but in the later case of *Gregory v. Cattle* (4) the court declined to hear the case, holding that they had no jurisdiction to do so.

Marshall K.C. for the appellant. In *Gregory v. Cattle* (4) the attention of the court was not called to the two earlier decisions on the point which might have led them to come to a different conclusion. It is submitted that when, as in the present instance, the delay in stating the case was not due to the appellant, he should not be prejudiced by the failure of the justices to comply with the rule.

(1) (1933) 97 J. P. N. 754.

(3) [1899] 2 Q. B. 673.

(2) (1894) 10 T. L. R. 357.

(4) [1943] K. B. 412.

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LORD GODDARD C.J. A preliminary objection has been taken to the hearing of this appeal on the ground that the case was not stated within the requisite period of three months of the application to the justices to state a case. There is nothing before the court to show why the justices did not state the case ; we only know they did not state it within three months. What I am about to say is to be taken to apply where there are no facts before the court to show that the delay in stating the case was caused by the applicant, because if an applicant, for some reason, such as taking frivolous objections to the case and continually sending it back to the justices with a request to restate it, were responsible for the failure of the justices to state a case within three months, I am far from saying that he might not be met with this rule. But, where the circumstances are no more than that an application has been made to the justices to state a case and they fail to do so within three months as might well happen, for instance, if the chairman of the justices or the clerk to the justices was ill, in my opinion the court has power in its discretion to allow the case to be heard on the ground that the limitation in the rules is directory and not mandatory.

This exact point was decided by Cave J. and R. S. Wright J. in *Hughes v. Wavertree Local Board* (1), and I should be very sorry to depart from what is there laid down by those two judges. They held in terms that the rule was only directory, and that, therefore, it was not a fatal objection that the justices had not stated the case within three months, and they allowed the case to be heard. That decision was followed in *Lane v. Rendall* (2), where counsel of considerable experience in these matters, Mr. George Elliott, took a similar objection. It was met by the court at once, without calling on the other side, by a reference to *Hughes v. Wavertree Local Board* (1), and Mr. George Elliott did not continue his objection.

Confusion has been caused by the decision in *Gregory v. Cattle* (3), which came before the court in 1943, and in which the same objection was taken. Counsel in that case did not cite the earlier authorities to the court, and the only question which the court considered was whether it was possible to say that the case was stated under the Summary Jurisdiction Act, 1857, which contains no time limit notwithstanding the rules made under the Summary Jurisdiction Act, 1879, which contain

(1) 10 T. L. R. 357.

(3) [1943] K. B. 412.

(2) [1899] 2 Q. B. 673.

such a limit, and the court held that the two Acts must be read together and that the rules made under the Act of 1879 applied equally to the Act of 1857. That must be treated as a case in which the court acted per incuriam, because their attention was not called to the direct authority on the point. It was laid down in *Young v. Bristol Aeroplane Co., Ltd.* (1), that the Court of Appeal is bound, by its own judgments with certain exceptions, and one of those exceptions is where the court gives a decision per incuriam because the provisions of a statute or the authority of a case have not been brought to their attention. In *Gregory v. Cattle* (2) it was not brought to the attention of the court that this matter had been decided by *Hughes v. Wavertree Local Board* (3) and *Lane v. Rendall* (4).

I should be very sorry to hold that where the delay is due to the action of the justices and not to the action of either party, that was a fatal objection. I am not sure that the court could not apply the maxim *actus legis nulli facit injuriam*, the English translation of which is, that the act of the law does wrong to no man. For some reasons, whether good or bad, the justices here failed to send the case to the parties within three months, and if that were to prevent a man bringing his case before the court, it would be a serious matter. In my opinion the preliminary objection ought not to prevail, and I think we have jurisdiction to hear this case.

MACNAGHTEN J. I agree.

LYNSKEY J. I agree.

A. P. Marshall K.C. for the appellant. The justices were right in disregarding the letters which the respondent alleged that she had received from the appellant, since it was laid down in *Johnson v. Pritchard* (5) that in bastardy proceedings a complainant cannot corroborate herself by saying that a letter produced by her was written to her by the alleged father. Apart from the letters there was no corroboration of the respondent's evidence. It was held in *Burbury v. Jackson* (6) that evidence of mere opportunity was not sufficient corroboration of the evidence of the mother and in *Thomas v. Jones* (7) Bankes L.J., said that evidence which was equally consistent

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(1) [1946] A. C. 163.

(2) [1943] K. B. 412.

(3) 10 T. L. R. 357.

(4) [1899] 2 Q. B. 673.

(5) 97 J. P. N. 754.

(6) [1917] 1 K. B. 16.

(7) [1921] 1 K. B. 22.

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with the story of the complainant as with that of the respondent could not be regarded as corroboration. The facts found by the justices in this case could not amount to corroboration in law, particularly in view of the moral laxity which prevails at the present time and which renders it more necessary than ever that the requirements of the law in regard to corroboration should be complied with strictly. The fact that the parties went together to cinemas, licensed houses and dances and that the appellant visited the respondent's home is not sufficient. If mere association is to be regarded as evidence of the probability of misconduct, the defence of an innocent man in cases of this character would be rendered almost impossible.

Herrick Collins for the respondent. It is submitted as a general proposition that where there is independent evidence that for a long period of time, including the probable date of conception, the putative father has chosen to associate with the mother on terms of close friendship or affection, and there is no evidence that at the possible date of conception the mother was associating with any other man, there is material which the justices, as a matter of law, are entitled to treat as corroboration, and that, if there is any evidence which could be held to be corroboration, it is for the justices to say whether they are satisfied with it. In *Thomas v. Jones* (1) Scrutton L.J. in a dissenting judgment said "the fact that the man has had "connexion with the woman and a child has resulted is sometimes inferred from evidence of previous affection, that they "had been seen together showing affection to each other." In that case and also in *Burbury v. Jackson* (2) it was held that there was no corroboration, but in both cases the evidence of close association was equally consistent with the story of the complainant and the respondent, because, in each case, the complainant by reason of her occupation was necessarily living in association with the putative father. It was accordingly held that no inference could be drawn from the association and that evidence of opportunity did not provide the necessary corroboration. *Dunn v. Chalmers* (3) is a clear authority for saying that evidence of a state of affection between the parties may afford evidence of corroboration. (See also *Cole v. Manning* (4).) With regard to the question of the letters produced by the respondent, it is admitted in view of the

(1) [1921] 1 K. B. 22, 39.

(2) [1917] 1 K. B. 16.

(3) (1875) 3 Rettie 236.

(4) (1877) 2 Q. B. D. 611.

decision in *Johnson v. Pritchard* (1) that there is a difficulty in treating them as corroboration because, apart from the mother's evidence, there was no evidence who wrote them. [Lord Goddard C.J. I should have thought that once the mother had proved the letters, and on looking at them it was found that they clearly indicated that the writer was the father of the child, that would be evidence corroborating the evidence of the mother in some material particular. It is very desirable that *Johnson v. Pritchard* (1) should be considered by the Court of Appeal, but while it stands we are in a difficulty.] In *Johnson v. Pritchard* (1) there was no other evidence of corroboration except the letters, whereas in the present case there was evidence that the appellant was on terms of intimacy with the respondent and was the kind of person who might have written the letters. In a note in Stone's Justices Manual, 86 ed. (1946), 461, there is a statement to the effect that if there be other corroboration, the complainant may prove the letters. The authority given for that statement is the unreported case of *Richardson v. Standish* which was decided by the Divisional Court on December 19, 1933, about a month later than the decision in *Johnson v. Pritchard* (1). In any event, however, apart from the letters, it is submitted that there was ample evidence of corroboration in the present case.

A. P. Marshall K.C. in reply.

LORD GODDARD C.J., stated the facts, and continued. The question in this case is the familiar one whether there was evidence which the justices could regard as corroboration of statements made by the respondent. If there was evidence, and the justices accepted it, as they did in this case, this court cannot interfere. Let me say at once, although I shall deal with the question more particularly at the end of my judgment, that in my opinion, as the law stands, the justices were right in rejecting the two letters which were tendered by the respondent in evidence, and which, if they had been proved by another witness, would have proved beyond the possibility of doubt that the appellant was the father of the respondent's child. We must take it that those letters could not be looked at as corroboration, and, therefore, we have to consider whether the other facts which the justices found, and the inferences which they have drawn from the evidence which was given, amounted to corroboration. In my opinion they do.

(1) 97 J. P. N. 754.

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For many years since I have known anything about the law on this matter, it has been the practice, and very often the only way of giving corroborative evidence in these cases, to prove that the two young people concerned were, perhaps, a courting couple or sweethearts or, at any rate, were associating together on terms, to use the justices' expression, of intimacy and affection. The justices were not using the word "intimacy" in what I may call the newspaper sense, meaning sexual intercourse, but obviously they were satisfied on the evidence before them that these young people were, and had, for a long period of time, been associating together on the closest terms of intimacy and affection, visiting places of amusement and refreshment, and going to dances together, and being in the company of each other in the evenings and that the appellant visited the girl's home, which means, I suppose, that her parents were allowing the appellant to go there because, as the justices were satisfied, the parties were obviously on courting terms. It should be added that there was no suggestion that the respondent was having an association with any other man, a very important matter in these cases. It was also found by the justices that no act of intimacy had ever been seen by any person, but as Scrutton L.J. pointed out in *Thomas v. Jones* (1) it is a matter of common knowledge or common sense that it very seldom indeed happens in these cases that any act of sexual intercourse is ever seen.

It was said that the evidence in this case amounted to nothing more than to proof of opportunity, and Mr. Marshall's main argument was based on the authority of *Burbury v. Jackson* (2). The headnote of that case, which in my opinion goes too far, and should be qualified, is this: "On the hearing of a bastardy summons evidence of mere opportunity is not sufficient corroboration of the evidence of the mother to satisfy s. 4 of the "Bastardy Laws Amendment Act, 1872."

The facts in *Burbury v. Jackson* (2) were very different from the facts in the case before us. It was a case in which the mother and the alleged father were both workers on a farm, where they lived and where they had to be every day. In the course of their ordinary duties they would be in and out of the cowsheds, barns and various other places, and, therefore, said the court, the fact that those two people were together on the farm where their duties obliged them to be could not be taken as corroborating the fact that sexual connexion took place between them.

(1) [1921] 1 K. B. 22.

(2) [1917] 1 K. B. 16.

So too, in the case of *Thomas v. Jones* (1). There the alleged putative father was the employer of the woman, who was his housekeeper and so, naturally, was living in the house. I can well understand the court saying in those two cases that, in the circumstances, it could not be said that there was evidence of an association from which any adverse inference against the man could be drawn, because the two persons were not associating for any other reason than that they were thrown together in the ordinary natural course of things, in the one case because they were both employed at the same farm, and, in the other case, because the woman was acting as housekeeper to the man.

In the present case what we have is a young man and a young woman who, as the justices obviously found, and I must assume were entitled to find on the evidence, were sweethearts. In those circumstances it seems to me that, it being proved by independent evidence that these young people were acting in the way I have mentioned, going about together, associating together at different hours of the day and night, being in each other's company for various periods of time, and so forth, there was evidence proved by other witnesses, which the justices could regard as corroboration. If authority is really required for that view it is amply supported by *Dunn v. Chalmers* (2), a decision of the Court of Session, in which it seems to me that particular stress was laid by the Lord President on the fact that the parties were sweethearts. I think it would be going far beyond any case which has ever yet been decided if we were to say that justices were not entitled to take the circumstances which existed in the present case into consideration, more especially when there was no suggestion that the respondent was associating with anyone else, because that shows that she was keeping herself for her man and keeping herself to one man. The parties were associating together in circumstances which might quite naturally lead to their having sexual intercourse with each other, and I do not think it would be possible to hold on the facts found by the justices that there was no evidence which would tend to make it probable—that is the test, tend to make it probable—that the respondent's story was true and that the man, therefore, was the father of the child.

I should like to add that I think that Mr. Herrick Collins put the proposition for which he contended in a perfectly correct form. His proposition was this: where there is evidence that over a long period, including the time of conception, the alleged

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father has chosen to associate with the mother on terms of close affection, and there is no evidence that the mother was associating with other men, there is material which the justices are entitled to treat as corroboration of the mother's statement. I agree with that proposition.

It only remains to deal with the question of the two letters produced by the respondent which, as I have already said, if written by the appellant would have shown beyond the possibility of doubt, that he was the father of the child. The justices rejected those letters as corroboration on the authority of *Johnson v. Pritchard* (1) of which a note appears in the Justice of the Peace Newspaper, in its weekly notes of cases, and also in the Law Times Newspaper (2) in substantially the same terms. In that case there was no other evidence of corroboration except some letters produced by the complainant which she swore were in the respondent's handwriting. The court held "disapproving of the passage in Stone's Justices Manual, cited above, that a complainant in bastardy proceedings cannot corroborate herself by saying that a letter produced by her was written to her by the alleged father, and the appeal must be allowed." The passage in Stone's Justices Manual which was disapproved appeared on p. 409 of the 65th ed., and was in the following terms: "While as a matter of prudence, it is desirable that the handwriting should be proved by other testimony than that of the woman, we are of opinion that her evidence alone, if credible, is sufficient for the purpose, and that letters, when thus proved, may furnish the corroboration required by the statute." In a note on p. 461 of the 78th ed. of Stone's Justices Manual it is stated that "if there be other corroboration, the complainant may prove the letters." The authority given for that statement is the unreported case of *Richardson v. Standish* which was heard by a Divisional Court in December, 1933. I have seen the case stated in that case, but as there is no note on it except that the appeal was dismissed it does not afford much assistance. There were letters in that case which seemed only to have been produced by the respondent but there was other evidence on which the justices were entitled to act and which clearly afforded corroboration. I can find no indication from the case whether or not the statement in Stone's Justices Manual that "if there is other corroboration the complainant may prove the letters" formed part of the judgment of the court in *Richardson v. Standish*, but knowing how carefully

(1) (1933) 97 J. P. N. 754.

(2) 176 L. T. Jour. 389.

Stone is edited, I am sure there must have been some reason for making the statement. If *Johnson v. Pritchard* (1) was rightly decided, I find some difficulty in understanding how the letters in *Richardson v. Standish* could become admissible as corroboration merely because some other fact was corroborated in the case. I hope that *Johnson v. Pritchard* (1) may some day be considered in a higher court, but sitting in this court I think we are bound by it, although we have not had the advantage of seeing any report which shows the reasoning of the court. The difficulty which I have in accepting the case is this: The statute does not require the whole of the mother's evidence to be corroborated, if it did, it would mean that the case could be proved, or in many cases could be proved, without calling the mother herself. The mother's evidence in *Johnson v. Pritchard* (1) seems to have been this: First of all she swore that the man was the father of her child, and next that two letters which she had received and which she produced, were in the respondent's handwriting. If the letters were admissible on her evidence, the statements in the letters being written by the man himself were at once evidence against him. While the production of the letters would not corroborate the evidence of the complainant that the respondent wrote them, they would corroborate her evidence that he was the father of her child. That is a material particular and, therefore, it seems to me that the production of the letters would afford corroboration in a material particular. However, so long as the decision in *Johnson v. Pritchard* (1) stands, I think we are bound by it in this court and consequently the letters in the present case cannot be treated as corroboration. As I have said, I hope that the case may some day be considered by a higher court and that we shall have the advantage of a full judgment on the question whether letters, such as those produced in the present case, are admissible or not. As matters stand we must not, any more than the justices, pay any attention to them, but on the grounds which I endeavoured to express earlier in my judgment, in my opinion, the justices came to a decision at which they were entitled to arrive because there was evidence, which, if accepted, could amount to corroboration. The appeal must, therefore, be dismissed.

MACNAGHTEN J. I am of the same opinion.

(1) 97 J. P. N. 754.

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LYNSKEY J. I agree.

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Appeal dismissed.

Solicitors for the appellant: *Callingham, Griffith & Bate, for Varley, Hibbs & Co., Coventry.*

Solicitors for the respondent: *Field Roscoe & Co., for Pownall, Teebay & French, Nuneaton.*

P. B. D.

1947

July 1.

POLICE AUTHORITY FOR HUDDERSFIELD v.
WATSON.

Lord Goddard
C.J.,
Atkinson and
Lewis JJ.

Pension—Police constable—Determination of services on account of ill-health—Duodenal ulcer—Incapacity due to conditions of service—Claim to special pension—Whether disease “an injury received in the execution of his duty”—Previous decision of Divisional Court binding on that court—Police Pensions Act, 1921 (11 & 12 Geo. 5, c. 31), s. 2, sub-s. 1 (c).

The Divisional Court is bound by its own previous decision in the same way and subject to the same exceptions as the Court of Appeal.

Young v. Bristol Aeroplane Co. [1944] K. B. 718 followed.

Decision of Divisional Court in *Garvin v. Police Authority for City of London* [1944] K. B. 358 followed.

APPEAL from quarter sessions.

The respondent, William John Watson, a constable in the Huddersfield county borough police force, was in 1946 called on to resign on account of ill-health. He was suffering from a duodenal ulcer which, he alleged, was the result of the conditions of his police services before and during the early years of the war. His claim to a special pension under s. 2, sub-s. 1 (c) of the Police Pensions Act, 1921 (1) was rejected

(1) Police Pensions Act, 1921. “received in the execution of Section 2, sub-s. 1 (c): “If at “his duty without his own “any time he [a member of a “default, shall be entitled on a “police force] is incapacitated “medical certificate to retire “for the performance of his “and receive a special pension “duty by infirmity of mind or “for life.” “body occasioned by an injury

by the Police Authority, but on appeal to quarter sessions the recorder allowed the appeal, holding that he was bound by the decision of the Divisional Court in *Garvin v. Police Authority for City of London* (1).

The Police Authority appealed.

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Streatfeild K.C. and *G. W. Wrangham* for the appellants. In fact what the learned recorder has found is that this was an accidental injury within the meaning of the Police Pensions Act, although it could not be an accidental injury, for instance, under the Workmen's Compensation Acts. It is submitted that "injury" in this Act means an injury which must be related to some event. Duodenal ulcer is something quite different. It is a disease which is peculiar to people who are predisposed to suffer from it and it is impossible to say there is any moment of time when there is a lesion or formation of an ulcer. In ordinary language a person does not "receive" a disease as a person receives an injury. The statute where it means disease uses the word "disease" and where it means injury it uses the word "injury." In its framework the Act indicates that "injury" is used in contradistinction to "disease." Before *Garvin v. Police Authority for City of London* (1) was decided every Police Authority regarded "injury" as a traumatic event.

[LORD GODDARD C.J. Are you submitting that this court is not bound by the decision in *Garvin's* case (1) ?]

When, as in this case, there is no means of appealing to a court of error, there is not the same obligation to follow the decision of another court of co-ordinate jurisdiction: see per Pollock C.B. in *Taylor v. Burgess* (2). In *Young v. Bristol Aeroplane Co., Ltd.* (3) the Court of Appeal was not the final tribunal. That case went to the House of Lords (4). Humphreys J. in *Garvin's* case (1) was confusing the meaning of "accident" in the Workmen's Compensation Acts with the meaning of "injury" in the Police Pensions Act. What he overlooked was that even though you may not have to prove accident you have still to show it was an injury within the meaning of s. 2. A disease cannot be an injury under s. 2 unless it be that type of disease which results from an injury.

Hinchcliffe K.C. for respondent, was not called on.

(1) [1944] K. B. 358.

(2) (1859) 5 H. & N. 1, 5.

(3) [1944] K. B. 718.

(4) [1946] A. C. 163.

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LORD GODDARD C.J. stated the facts and continued: It is not necessary for me to go in detail into the reasons why the learned recorder came to his decision. His findings of fact are not attacked in any way, and therefore we have it that the officer was incapacitated for the performance of his duty by infirmity of body, and the infirmity of body was due to the exceptional character of his police service. The question that arises is whether it can be said that a duodenal ulcer is an "injury received in the execution of his duty without his own default," and I may say at once that no question about the man's default arises. The matter was evidently very fully argued before the learned recorder, who gave a full and careful judgment, and although he indicated in the judgment that for many reasons he would be inclined to accept—that is what I gather from his judgment—the arguments of Mr. Wrangham, who then argued the case for the Police Authority, he held that he was bound by the decision of this Court in *Garvin v. Police Authority for City of London* (1), and he accordingly allowed the appeal. Before us, Mr. Streatfeild, on behalf of the Police Authority, has challenged the correctness of the decision in *Garvin's* case, and he seeks to argue that on a review of the material sections in the Act of 1921, it should not be held that an illness or disease could amount to an injury received in the execution of duty. I understand his argument to be that the alleged injury in this case is not something in the nature of a condition caused by a blow or the breaking of a bone or a matter of immersion in water, owing perhaps to a thief pushing the officer into the water, or the officer jumping into water in pursuit of a thief, and matters of that sort, and that a disease due to a diseased state of body cannot be regarded as an injury within the meaning of this Act.

If we were to hold that, it seems to me we should be going directly against the decision which has been given in *Garvin v. Police Authority for City of London* (1). I will read the head-note in that case because I think it sets out sufficiently exactly what the court did decide: "The appellant, a police constable, " was on duty during the aerial bombardments from September, " 1940, to the middle of 1941, serving twelve hours a day " instead of the usual eight hours. During that time he could " only take meals at irregular hours and was subjected to " constant wettings. The medical evidence showed that these

(1) [1944] K. B. 358.

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“conditions would render him more liable to contract tuberculosis, and in fact tuberculosis supervened sometime after September, 1940 :—*Held*, (1.) that tuberculosis contracted in these conditions was an ‘injury’ within s. 2, sub-s. 1 (c), of the Police Pensions Act, 1921, and (2.) that it was the direct result of and therefore suffered in the execution of his duty within the meaning of the same sub-section, and that consequently the appellant was entitled to the special pension therein referred to.” Having read that head-note, which I think succinctly and correctly sets out the decision of the court, it seems to me it is impossible for us to say that the ratio decidendi of that case is not one which applies to the facts of this case. There is a difference, no doubt, in that tuberculosis is due to a bacillus or a germ generally referred to as a tubercule; and the condition of duodenal ulcer is said to be “a continuous process which begins in inflammation, and there may be an imperceptible lesion or abrasion at the point in which the pre-ulcerative condition of the mucous membrane passes into an ulcerated condition. It is a continuous process, probably, from the pre-ulcerated condition, through the whole of the ulcerated condition, up to the full flower of the ulcer.” I am quoting from a passage in the learned recorder’s judgment in which he sets out the medical opinion he accepts on that matter.

In my opinion, *Garvin’s* case (1) does not depend, as some of the cases under the Workmen’s Compensation Act, at any rate at one time, depended, on whether you could say that at a particular moment of time a bacillus or germ of some disease entered into a man’s body as, for instance, in the very early case under the Workmen’s Compensation Act of *Brintons, Ltd. v. Turvey* (2). There, the germ of anthrax entered into a man’s body. He died, and it was held that the attack of the disease by means of a germ was an accident arising out of and in the course of his employment. It seems to me that the ratio in *Garvin’s* case (1) is this, that if it is proved that the bodily condition from which the man is suffering, whether it be rheumatism, whether it be tuberculosis and, I would add, whether a duodenal ulcer, is directly and causally connected with his service as a police officer, then he has received an injury in the execution of his duty. I can imagine many arguments which may or may not have been addressed to the court in *Garvin’s* case (1). I can imagine an argument founded

(1) [1944] K. B. 358.

(2) [1905] A. C. 230.

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upon other sections in the Act which might have been brought to the attention of the court. Whether they were or not one cannot tell, because naturally enough the arguments are very condensed in the report, but at any rate we have got the decision, and the decision, in my opinion, directly covers this case. The court in that case laid down in terms that it was not necessary to decide whether there had been an accident or whether there had not; if it could be shown there was an injury—and they had no difficulty in holding that a disease was an injury—there was an end of the matter provided it was sustained in the execution of the man's duty. Humphreys J., who delivered the judgment of the court, said: "It would probably be impossible in any case of pulmonary tuberculosis to establish by evidence the day or the week, or, perhaps, even the month, during which the infection of the lung occurred, but where it is shown that the conditions of service during the critical period were such as to cause unusual mental and bodily strain, which, acting on a frame ordinarily healthy but at the time enfeebled by long hours of duty, frequent wettings and such matters, rendered it more liable than usual to such infection, I think the injury might be described as being the direct result of, and, therefore, suffered in, the execution of duty." I do not read that judgment as laying particular stress on the word "infection." I think he is using the word "infection" there simply to mean the onset of the disease. I think here, too, in the case of duodenal ulcer, in the opinion of the medical faculty there is no infection in the sense that there is in the case of many other diseases. It is a gradual process starting in inflammation and finishing in an ulcer, and I can only read the reasoning in that case, and the ratio decidendi, as applicable to this case.

Mr. Streatfeild has argued that it is open to us to depart from *Garvin's* case (1) if we think it was wrongly decided. As we have not heard his full argument, I prefer only to say this: Nothing that I have heard in this case, as far as the argument has gone, satisfies me that *Garvin's* case (1) was wrongly decided; but whether it was rightly decided or not I am clearly of opinion that we ought to follow it. This court is made a final court of appeal in these matters, and I can imagine nothing more disastrous than that where the court has given a decision upon the construction or application of this Act

another court should give a decision contrary to the decision already given, because there then would be two conflicting cases. You might get a court consisting perhaps of different judges choosing one of those decisions, and another court choosing the other decision, and there would be no finality in the matter at all. For myself, I think we ought to hold that we are bound by this decision, and I say so for this reason: The Court of Appeal in *Young v. Bristol Aeroplane Co., Ltd.* (1), held, after argument before the full court of six judges, that the Court of Appeal was bound by its own decisions, with certain well-defined exceptions. The Master of the Rolls summarized it in this way: "The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarize: (1.) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2.) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3.) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam." What is meant by giving a decision per incuriam is giving a decision when a case or a statute has not been brought to the attention of the court and it has given its decision in ignorance or forgetfulness of the existence of that case or that statute.

If that is the rule which is applicable in the Court of Appeal—it is to be remembered that Court of Appeal judgments are reviewable in the House of Lords, at any rate by leave—and the Master of the Rolls pointed out in the course of his judgment that in some cases Court of Appeal judgments are final, as in bankruptcy, and in others are reviewable by the House of Lords, and yet he draws no distinction—and if, therefore, in a court most of whose decisions are reviewable, although it may be only by leave, in the House of Lords, those decisions are binding on the court, how much more important is it that this court, which is a final court, should follow its own decisions and consider that it ought to give full force and effect to them. Otherwise, as I have said, a great deal of uncertainty would be introduced into the law.

I know that in the writings of various eminent people the doctrine of stare decisis has been canvassed from time to time. In my opinion, if one thing is certain it is that stare

(1) [1944] K. B. 718.

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decisis is part of the law of England, and in a system of law such as ours, where the common law, and equity largely, are based on decisions, it seems to me it would be very unfortunate if a court of final appeal has given a decision and has laid down a definite principle and it cannot be said the court has been misled in any way by not being referred to authorities, statutory or judicial, which bear on the question, that it should then be said that that decision was not to be a binding authority.

As I have said, I do not propose to say more about the reasoning in *Garvin's* case (1) because we did not perhaps hear all that Mr. Streatfeild had to say, though it must not be thought I am throwing any doubt on the correctness of the decision. I have come to the conclusion that we ought to follow that case, and I have only one other word to say. Mr. Streatfeild in the course of a very careful argument, has called our attention to certain dicta, in which apparently judges have said that a court is bound by decisions of a court of co-ordinate jurisdiction if they are subject to appeal but not otherwise. We are not here considering the decision of a court of co-ordinate jurisdiction. I think the Chief Baron in *Taylor v. Burgess* (2), to which Mr. Streatfeild referred, was considering the position in the days when there were three Superior Courts. He, sitting in the Court of Exchequer, was dealing with the way he regarded the decisions of the other courts which were reviewable by the Exchequer Chamber. Here, we are now one court and we are not considering a decision of a court of co-ordinate jurisdiction. We are considering a decision of this court. So far as the dictum of Grove J. is concerned, I can only say for myself that I think the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction. He is only bound to follow the decisions which are binding on him, which, in the case of a judge of first instance, are the decisions of the Court of Appeal, the House of Lords and the Divisional Court.

For these reasons I am of opinion that we ought to decide this case in accordance with the decision in *Garvin v. Police Authority for City of London* (1). I have come to the con-

(1) [1944] K. B. 358.

(2) 5 H. & N. 1, 5.

clusion that the learned recorder was quite right in regarding himself as bound by it, that we should follow that case, and therefore this appeal will be dismissed.

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ATKINSON J. I agree, and would merely add this, that the case of *Garvin* really does not stand alone. Already the House of Lords has held that broncho-pneumonia is an injury or may be an injury, heat-stroke may be an injury, and rheumatism also. If broncho-pneumonia, heatstroke, rheumatism and tuberculosis can all be injuries, it is very difficult to hold that a duodenal ulcer is not an injury. Speaking for myself, although we have not heard the full argument of Mr. Streatfeild, I should like to say that I think *Garvin's* case (1) is absolutely right, but, right or wrong, I think we are bound to follow it.

LEWIS J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for Harry Bann, Town Clerk, Huddersfield.*

Solicitors for respondent: *Crossman, Block & Co., for Eaton Smith & Downey, Huddersfield.*

(1) [1944] K. B. 358.

A. W. G.

CARTER PATERSONS & PICKFORDS CARRIERS LIMITED v. WESSEL.

1947
July 7.

Criminal law—Receiving—Aiding and abetting—Principal in the second degree—Summary Jurisdiction Act, 1848 (11 & 12 Vict., c. 43), s. 5.

Lord Goddard
C.J.,
Macnaghten and
Lynskey JJ.

The respondent, a van driver in the employment of a firm of carriers, knowing that two of a number of packages, which had been loaded into his van at the firm's Leicester depot for carriage to the Nottingham depot, had not, owing to an oversight, been entered on his consignment note, stopped on his journey and removed the two packages from the van to the roadside. On arriving at Nottingham the respondent and another man returned in a motor car to the spot where the two packages had been left, placed the packages in the motor car, and were driving back to Nottingham when they were arrested. On informations preferred

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by the respondent's employers he was charged before a court of summary jurisdiction with larceny and also, together with the other man, with receiving the goods knowing them to have been stolen. The justices acquitted the respondent of larceny but found him guilty of receiving, and imposed a fine of 50*l*. On appeal by the respondent to quarter sessions the recorder quashed the conviction for receiving and held that the justices having heard and dismissed the charge of larceny he had no jurisdiction to vary or set aside their order, or to convict the respondent of larceny. The employers appealed.

Held, that although on the charge of receiving it was impossible to treat the respondent as the principal offender, he being the thief and never having parted with his felonious possession of the goods, nevertheless under s. 5 of the Summary Jurisdiction Act, 1848, as a person who had aided, abetted, counselled or procured the commission of the offence, he was equally liable with the principal offender to conviction and penalty. The case must therefore be remitted to the recorder with an intimation that he should uphold the conviction by the justices and consider the appropriate penalty to be inflicted, in which respect he had the same powers as the Court of Criminal Appeal.

CASE STATED by quarter sessions.

At a court of summary jurisdiction sitting at Nottingham on October 29, 1946, informations were preferred by Carter Patersons & Pickfords Carriers, Ltd., against Leslie James Wessel for that he (a) between October 6 and 7, 1946, being their servant, stole from them a quantity of ladies' and children's underwear of the value of 69*l*. 1*s*. 3*d*., contrary to s. 17, sub-s. 1 (a) of the Larceny Act, 1916, and (b) together with Walter Lawrence on October 6, 1946, received the said underwear knowing the same to have been stolen, contrary to s. 33 of the Act of 1916.

The justices found the respondent not guilty of larceny but convicted both him and Lawrence of receiving, and ordered the respondent to pay a fine of 50*l*. The respondent appealed to quarter sessions against his conviction for receiving.

The appeal was heard by the Recorder of Nottingham on January 9, 1947, when the following facts were proved or admitted. On the evening of October 6, 1946, the respondent Wessel, in the course of his employment, drove a motor van belonging to Carter Patersons & Pickfords Carriers, Ltd. from the company's depot at Nottingham to their depot at Leicester, where the van was loaded with goods to be transported to the Nottingham depot. Among the goods so loaded were two parcels which by some oversight were not entered

on the consignment note. This fact was known to the respondent, who, at a point on the Loughborough Road, on his route to Nottingham, removed the two parcels from the van to the roadside. He subsequently returned in a motor car with Lawrence and picked up the two parcels, but on their way back to Nottingham the two men were stopped and arrested by the police.

The learned recorder held that at the time the respondent received possession of the goods at the Leicester depot they were not stolen goods, but that at the time when he removed them from the roadside where he had placed them and put them into his car he fraudulently converted them to his own use. He accordingly quashed the conviction for receiving. He further found as a matter of law that the justices having heard and determined the charge of larceny and dismissed it, he had no jurisdiction to vary or set aside the order of the justices or to convict the respondent of larceny.

Carter Patersons & Pickfords Carriers, Ltd., appealed.

The question submitted by the recorder for the opinion of the Divisional Court was whether he had come to a right decision in point of law.

Anthony Hawke for appellants. The learned recorder could properly have found this man guilty of receiving on the ground that when he conveyed to the spot where the stolen property had been placed at the roadside the person who was going to receive it, he assisted the receiver in acquiring possession of the goods and thus aided and abetted the receiver to receive. He was therefore liable to conviction and a like penalty as the receiver under s. 5 of the Summary Jurisdiction Act, 1848 (1). If that is so it is unnecessary to argue the

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(1) Summary Jurisdiction Act, 1848, s. 5. " Every person " to the same forfeiture and " punishment as such principal " who shall aid, abet, counsel, " offender is or shall be by law " or procure the commission of " liable, and may be proceeded " any offence which is or here- " against and convicted either " after shall be punishable on " in the county, riding, division, " summary conviction shall be " liberty, city, borough, or " liable to be proceeded against " place where such principal " and convicted for the same " offender may be convicted, or " either together with the " in that in which such offence " principal offender, or before " of aiding, abetting, counsell- " or after his conviction, and " ing, or procuring may have " shall be liable on conviction " been committed."

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further point whether the recorder had power to substitute for the conviction for receiving a conviction for larceny. On that point there appears to be no authority.

The respondent was not represented.

LORD GODDARD C.J., stated the facts and continued: The case being apparently proved to the satisfaction of the justices, why they acquitted the respondent of the offence of larceny as a servant I do not know, but they convicted him of receiving, possibly because, as they convicted Lawrence of receiving, they thought they would convict both men of the same offence. As far as the offence of receiving is concerned, it would be impossible to treat the respondent as a principal in the first degree because he was the thief. He had not parted with felonious possession of the goods and he certainly did not receive them from any particular person after they had been stolen. He was constructively in possession of the goods, although it was felonious possession, all the time.

Therefore, the learned recorder was right in the view that he took but for one thing. His attention was not called to s. 5 of the Summary Jurisdiction Act, 1848, which is in the same terms as the well-known Aiders and Abettors Act, 1861. I think it is quite right, as Mr. Hawke said, that the Aiders and Abettors Act is really only declaratory of the common law, because if two people are concerned in the commission of an offence, they are both equally guilty. Under the old law, if a man was not present at the time an offence was committed but aided, abetted, counselled or procured the commission of it, he was called an accessory before the fact. If he was present at the time the offence was committed, he was called an aider and abettor, and this section of the Summary Jurisdiction Act, 1848, applies whether a person is technically an accessory or technically an abettor, it matters not which. [His Lordship read s. 5 and continued] : This deals with offences which may be dealt with summarily, and one of the offences which may be dealt with summarily is an offence under the Aiders and Abettors Act. The result of the section is that a person who aids and abets the commission of an offence is a principal in the second degree and he can be convicted, charged and punished as a principal in the first degree. In this case, which is the first time this has ever happened, in my opinion this respondent ought to have been convicted of receiving. He ought to have been convicted by the justices of

stealing, but having been convicted of receiving, the appeal ought to have been dismissed on the ground that although he was not a principal in the first degree, he was none the less a principal in the second degree, and s. 5 of the Summary Jurisdiction Act covers the case. If ever there was a case in which a person aided, abetted, counselled or procured the commission of the offence of receiving, surely this is that case. He went off and fetched Lawrence, who was the principal receiver, and brought him there in the car and thereby enabled the offence to be committed by Lawrence. Naturally, in the ordinary course, if a man is convicted of stealing and another man is convicted of receiving, one does not trouble to consider whether the thief aided and abetted the receiver, but that is the position in fact if it is he, the thief, who hands or sells the goods to the receiver, because except for the action of the thief, in those cases where the thief hands the goods or leaves the goods with the receiver, or sells them to him, the receiver would not have been able to receive the goods.

Therefore, it seems to me to be clear, although this point has not arisen before, that a man who acts in this way can properly be convicted as a receiver although he is also the thief, because he has in this case procured the commission of the offence by the receiver. Under those circumstances the recorder, on that ground, could and ought to have upheld the conviction. The case will go back to the learned recorder with an intimation that the appeal should be dismissed on the ground that I have indicated, and it will then be for the recorder to consider what the appropriate penalty is which he should inflict on the respondent, and he has the same powers as the Court of Criminal Appeal in that respect.

MACNAGHTEN J. I am of the same opinion and have nothing to add.

LYNSKEY J. : I agree.

*Question answered in negative.
Case remitted.*

Solicitors for appellants : *Sharpe, Pritchard & Co., for J. E. Richards, Town Clerk, Nottingham.*

A. W. G.

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May 21, 22.

Lord Greene
M.R.,
Tucker and
Asquith L.JJ.

Vendor and purchaser—Agreement for sale—Provision that it was a “provisional agreement until” fully legalized agreement drawn up and signed—Repudiation of bargain—Claim to recover deposit—Validity of agreement.

By an agreement dated July 15, 1946, the defendant agreed to sell to the plaintiff a mushroom farm for 5,000*l.*, of which 500*l.* was paid by way of deposit. The agreement contained the following clause: “This is a provisional agreement until a fully “legalized agreement, drawn up by a solicitor and embodying all “the conditions herewith stated, is signed.” The plaintiff having repudiated the agreement brought proceedings to recover the deposit on the ground that there was no concluded agreement:—

Held (reversing the decision of Denning J.), that on the true meaning of the words “This is a provisional agreement until,” the agreement remained effective until the fully legalized agreement was drawn up and signed. The drawing up and signing of the fully legalized agreement was not a condition of the agreement entered into so as to prevent there being a concluded agreement meanwhile.

APPEAL from Denning J.

By an agreement, dated July 15, 1946, the defendant, Jose Cobarro, agreed to sell to the plaintiff, Alfredo Branca, the lease and goodwill of the mushroom farms known as Martyns, Ifield, near Crawley, and all the appliances of the business for the sum of 5,000*l.* The document continued: “Alfredo Branca “undertakes to pay the above mentioned sum of 5,000*l.* “sterling as follows: 500*l.* deposit on July 15, 1946, 2,500*l.* “cash on Thursday July 18, 1946, and the remaining 2,000*l.* “within six months time as from to-day. In the event of “Alfredo Branca’s default of the conditions of payment the “farm, goodwill and appliances above mentioned go back to “Jose Cobarro as his full property. In this case of default by “Alfredo Branca, he will have no claim on the 3,000*l.* already “paid to Jose Cobarro. This is a provisional agreement until “a fully legalized agreement, drawn up by a solicitor and “embodying all the conditions herewith stated, is signed.” The 500*l.* deposit was duly paid but not the sum of 2,500*l.* due on July 18, 1946, and on the following day the plaintiff repudiated the bargain. On August 2, 1946, he commenced proceedings to recover the deposit of 500*l.* on the ground that there was no concluded agreement.

Denning J. said that the question was whether the execution of the formal contract was a condition or term of the bargain between the parties: much depended on the meaning of the word "provisional." He thought that word really meant tentative so that the bargain was one from which the party making it was able to resile without adverse consequences. It was all really tentative until a fully legalized agreement was drawn up and signed. The plaintiff's claim therefore succeeded. The defendant appealed.

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Fearnley-Whittingstall and *D. A. Ziegler* for the defendant. Denning J. has misconstrued the word "provisional." A provisional agreement is a binding agreement until it is superseded. That accords with the Oxford English Dictionary, which describes the use of "provisional" in the sense of "conditional" as obsolete. They referred to *Rossiter v. Miller* (1) per Lord Blackburn; *von Hatzenfeldt-Wildenburg v. Alexander* (2); *Chillingworth v. Esche* (3).

Winterbotham for the plaintiff. The one thing that a provisional agreement cannot be is a final agreement. In s. 94, sub-s. 4, of the Companies Act, 1929, the word "provisional" is used to describe an agreement which does not bind the parties until a certain event happens: *In re "Otto" Electrical Manufacturing Co.* (1905), *Ld.* (4); *Hoole v. Speak* (5). An agreement being made "provisional until" a fully legalized agreement is drawn up and signed can only mean that it is not binding till the proper agreement is signed. It is true that the provision that the payment of 2,500*l.* was to come only three days after the date of the agreement is hard to understand but an agreement which had to contain the same provisions could easily be prepared by a solicitor in the time.

[No reply was called for.]

LORD GREENE M.R. This case raises, in a very small compass, the familiar question whether an informal document does or does not constitute a contract or whether it is mere negotiation in contemplation of a contract coming into existence at some future date. There are one or two preliminary points to which I may refer about this document. First of all, it is expressed as an agreement. The provision for payment by

(1) (1878) 3 App. Cas. 1124. (3) [1924] 1 Ch. 97.

1151.

(4) [1906] 2 Ch. 390.

(2) [1912] 1 Ch. 284, 288.

(5) [1904] 2 Ch. 732, 735.

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the purchaser is worded in this way : " Alfredo Branca under-
" takes to pay," and in the concluding clause the word " Agree-
" ment " is used to describe the document. It is perfectly
true that words such as " agree " are by no means conclusive
of the question whether the parties were intending a contract
or had only arrived at a state of negotiation. Too much
weight must not be attached, therefore, to the words I have
mentioned. But, I think, in the particular context of this
document they are not without importance. One other point
I may mention is that the terms of payment were 500*l.* on
July 15—that is the date when the document was signed—
2,500*l.* cash on July 18. Though this is a small point and I do
not attach too much importance to it, it is, I think, consistent
with the view that I take as to the construction of this docu-
ment. July 18 was the date on which a large sum of money,
2,500*l.*, was to be paid. Of course, the parties may have
contemplated, as Mr. Winterbotham contends, that what they
call " a fully legalized agreement drawn up by a solicitor "
would have been prepared, agreed and signed before the
eighteenth. If that was not done, and if the purchaser did not
pay up the 2,500*l.*, the fully legalized agreement could not con-
tain all the terms of this document. It would have to be some-
thing different. Of course, they may have contemplated that
the whole thing could be done in three days, but one would have
thought that even these gentlemen might have hesitated before
coming to such a conclusion. That is only an indication but it
does throw, I think, some little light on the intention of the
parties. The decision must, however, turn on the last para-
graph, and, in my opinion, that last paragraph does not indicate
that the drawing up and signature of a formal document was to
be a condition of there coming into existence a binding
contract.

Down to the end of the paragraph preceding that final para-
graph there can be no question to my mind that the document is
a contract. If that final paragraph had not been there, no
question could have been raised about it. The sole question
is whether that paragraph introduces an element which destroys
any contractual efficacy in the rest of the document. It is in
rather an unusual form. " This is a provisional agreement
" until." That the parties contemplated and wished that
there should be what they call " a fully legalized agreement "
drawn up and signed is quite clear. But the first thing to notice
about these words is that they are not words expressive of a

condition or stipulation to that effect. The familiar words "subject to contract," and many other forms of words that one has come across in this class of case are words of condition. But these are not words of condition or stipulation. The word "until" in this context to my mind clearly means that what is called "a provisional agreement" is going to have some efficacy until a certain event happens; in other words, the efficacy of the document is not made in any sense conditional on the happening of that event. That event merely puts a term to the operation of what is described as "a provisional agreement," and it is noticeable that the parties describe the thing which is to have that operation until that event happens as "an agreement."

Mr. Winterbotham says: You must not attach too much importance to the word "agreement," and I have already expressed my own view to that effect; but it is significant that in this very clause, which is supposed to negative the existence of an agreement, the parties have chosen to use the word "agreement," a provisional agreement which is to have some operation until a certain event happens. If this paragraph is read in its ordinary meaning and if that event does not happen, this document will continue to have for an indefinite period the operation which the parties were giving to it. In other words, the happening of the event, namely, the drawing up of the fully legalized agreement, is something which is going to put an end to the operation of this document if and when it happens. It is not a condition of the operation of this document. On the contrary, it is a thing which, when it happens, will bring to an end a document which the parties clearly treat as being an operative document. I have used the word "operative" deliberately as a neutral word. The words "fully legalized agreement" I think, quite clearly mean what we generally call a formal agreement. It is an agreement which has got to embody "all the conditions herewith stated." No other conditions are to appear in that fully legalized agreement. The contents of that fully legalized agreement are described, namely, "all the conditions herewith stated" and there would be no room, according to the true construction of this, for the addition of other terms or conditions.

Denning J. decided this case according to the construction which he gave to the word "provisional." He said that, in his opinion, it meant "tentative." With the greatest deference, "tentative" is not, I should have thought, the meaning in

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ordinary English of the word "provisional." It certainly is not the meaning that is to be found in the Oxford Dictionary and I should have thought that in this context to change the word "provisional" and substitute the word "tentative" would be introducing something which is really not contained in the word "provisional." The idea expressed by the word "tentative" is something quite different to that expressed by the word "provisional." The ordinary meaning of the word "provisional" I should have thought was something which is going to operate until something else happens. If it was intended to show that the parties regarded themselves as entering into an agreement which was to last only until something else took its place or superseded it, the word "provisional" would be the proper and apt word to describe that intention. An agreement which is only to last until it is replaced by a formal document containing the same terms and drawn up by a solicitor could, I should have thought, be described by no more apt word than the word "provisional." When the word "provisional" is linked up with the word "until," the whole thing seems to me to fall into shape. My reading of this document is that both parties were determined to hold themselves and one another bound. They realized the desirability of a formal document, as many contracting parties do, but they were determined that there should be no escape for either of them in that interim period between the signing of this document and the signature of a formal agreement, and they have used words which are exactly apt to produce that result and do not, in my opinion, suggest that the fully legalized agreement is in any sense to be a condition to be fulfilled before the parties are bound. The word "until" is certainly not the right word to import a condition or a stipulation. In my judgment, if the parties did not ever sign a fully legalized agreement, the event putting an end to the provisional operation of this agreement would never have occurred and it would have continued to bind the parties. In the result, with all respect to the learned judge, I take a different view of this document to that which he took, for the reasons I have given, and the appeal must be allowed.

TUCKER L.J. I agree with the construction that has been put upon this document by the Master of the Rolls and for the reasons which he has stated. I will merely content myself with saying that the two matters which I think turn the scale in favour of the defendant are, firstly, and most important of all,

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the use of the word "until" and, secondly, the fact that by this document the sum of 2,500*l.* had to be paid in cash by July 18, 1946, and that upon the failure of such payment, the 500*l.* would be forfeited. The fact that that might occur at a time when the fully legalized agreement had not been drawn up is, I think, a factor to be taken into consideration. I think it is worthy of note that these foreign gentlemen drawing up this agreement had it witnessed by a third party. I think that tends to indicate that they were entering into a formal and binding agreement. I agree that the appeal succeeds.

ASQUITH L.J. I also agree. I do not think the authorities assist much. On any view, the term "provisional" as applied to an agreement, imports some restriction of its efficacy to which it would not have been subject in the absence of that epithet. The restriction may simply be a time limit within which the agreement is binding and beyond which it is not to go, or it may be some other resolute condition. This I should have thought was the meaning of "provisional" as applied to an agreement. It is true in one case cited to us a provisional agreement had been held to be an agreement not terminable on the fulfilment of a condition but inoperative until a condition precedent had been fulfilled; but in that case the language of the Companies Act was such as to make any other construction impossible. In the present case the language of the material clause in the so-called provisional agreement of July 15, and more especially the word "until," seems to me plainly to imply that that agreement is to be immediately fully binding unless and until superseded by a subsequent agreement of the same tenor, but expressed in more precise and formal language. I agree that this appeal should be allowed.

Appeal allowed.

Solicitors : *Chapman-Walkers ; Hughes, Minton & Barker.*

H. C. G.

{ *Applied.* JACOBS *v.*
L.C.C.
[1949] 1 K. B. 685 }

Applied. JACOBS *v.* L.C.C. [1949] 1 All E.R. 790. *Referred to.* JACOBS *v.* L.C.C. [1950] 1 All E.R. 737.

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June 23, 24,
27.

Lord Goddard
C.J.

HOWARD AND WIFE *v.* WALKER AND LAKE (TRUSTEES) AND CRISP.

Highway—Premises adjoining—Nuisance—Landlord and tenant—Landlord with right to enter and do repairs—Forecourt between shop and highway pavement not railed off, in disrepair—Invitee of tenant injured thereby, when returning to highway—Liability.

A tenant was in occupation of premises in a terrace on a tenancy from year to year by the agreement for which there was no obligation on the landlords, or the tenant, to do repairs, but the landlords had reserved the right to enter the premises to inspect or repair them and repairs, in fact, had always been done by the landlords. The tenant carried on a retail business at a shop on the premises, the forecourt of which, being of appreciable width, was not separated from the pavement of the highway by any railing or wall, though the line where the forecourt abutted on the pavement could be seen. In the course of time, the concrete of this forecourt had become broken and uneven and no repairs had been done to it. The plaintiff having visited the shop of the tenant, at dusk, was returning across the forecourt when, owing to its uneven and dangerous surface, she fell, fracturing a bone in her heel. In an action for damages, the court finding that the plaintiff was not guilty of contributory negligence:—

Held that the tenant was, but the landlords were not, liable, since the landlords were under no duty to the plaintiff to keep the demised premises in repair nor were they under a duty to her as a passenger on the highway, she being, at the time of her injury, on the land occupied by the tenant as his invitee. ■■■■

Wilchick v. Marks and Silverstone [1934] 2 K. B. 56, and *Heap v. Ind Coope & Allsopp, Ltd.* [1940] 2 K. B. 476, distinguished.

ACTION.

The second defendant, Walter Crisp, was tenant to the first defendants, William Selves Walker and Cuthbert Joseph Lake, the trustees of Samuel Walker's estate, of premises in a terrace, 72, Norwood High Street, originally under an agreement, dated December 11, 1913, for three years and, having held over, he continued as a tenant from year to year. No obligation to repair was imposed on either the landlords or the tenant, but by the terms of the agreement the landlords reserved the right to enter at reasonable times on the premises to inspect or repair them, as often as occasion required. Such repairs, as were done, had always been done by the landlords. The forecourt of the premises, which was of appreciable width, was not separated from the pavement of the highway by any railing or wall, though the line where the forecourt abutted on the

pavement could be seen. This forecourt had, at some time, been paved with concrete, which in the course of time had become broken and uneven and no repairs had been done to it. The tenant carried on a retail business on the premises at his shop.

On November 2, 1945, at 5.45 p.m. the plaintiff, Mrs. Clara Ann Howard who had often visited the shop before, went to the shop to make a purchase. Then, on her return, whilst crossing the forecourt towards the pavement she suddenly remembered that she wished to make a call at a house to her left, turned round, possibly suddenly, and fell heavily to the ground fracturing a bone in her heel. No evidence was called for the landlords.

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J. C. Lawrence for the tenant. To render the tenant liable for the plaintiff's injury there must have been something in the nature of a trap or concealed danger on the tenant's premises and there was none. The female plaintiff knew well both the forecourt and the shop and failed to use reasonable care. The evidence is consistent with her fall being due to a slip or fall not caused by the state of the forecourt. The duty of the tenant was to see that his premises were safe for a person using ordinary care and he was not in breach of that duty. The tenant, therefore, was not liable.

Stephen Chapman (*B. L. O'Malley* was with him) for plaintiffs. The tenant in occupation was liable, since he was under a duty to the female plaintiff, his invitee, to use reasonable care to prevent damage from an unusual danger of which he must have known. He was in breach of that duty and there was no contributory negligence on the part of the plaintiff. The landlords were also liable, since they had the right to enter the premises and to do repairs that might be required: *Wilchick v. Marks & Silverstone* (1) and *Heap v. Ind Coope & Allsopp, Ltd.* (2). In the former case the plaintiff was walking along a highway when she was injured by a defective shutter falling from a house abutting on the highway, and in the latter, the plaintiff was walking on the pavement on a highway, when a light shaft cover set into the pavement collapsed and the plaintiff fell through it into a cellar. In each case the plaintiff recovered damages from the owners of the property not in occupation of it. Here, the landlords must have known of the dangerous state of this forecourt, but it is irrelevant whether

(1) [1934] 2 K. B. 56.

(2) [1940] 2 K. B. 476.

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they knew or ought to have known of the danger. *Wringe v. Cohen* (1). The plaintiffs in the first two cases cited were on the highway when they came by their injuries, but in *Owens v. Thomas Scott & Sons (Bakers), Ltd. and Wastall* (2), the plaintiff had left the pavement highway and was walking on an adjoining asphalted forecourt in the occupation of the freeholder, when she fell, and was injured, by reason of the want of repair of the asphalt. The freeholder was held liable. In the case before the court the plaintiff having deviated from the pavement was returning to it, when she fell, owing to the condition of repair of the forecourt. There was a nuisance here adjoining the highway and the landlords were liable. The forecourt had been thrown open for the use of those on the highway, with the result that it was unsafe for those using the highway.

Berryman K.C. and *Marven Everett* for the landlords. This is not a case of nuisance. The cases on this point relied on by the plaintiff are founded on the principle that a landlord, who has retained the right to enter on premises adjoining the highway and execute repairs there, may be liable if the premises become a nuisance and injure persons using the highway. The duty is a general duty being based on the proximity of the premises to the highway for the safety of those on the highway. See your Lordship's observations in *Wilchick v. Marks and Silverstone* (3). Questions in relation to a highway have nothing to do with the present case. A person who enters the premises of a shop or is walking away from it, is in the same position as a grocer's boy walking up a garden path in any part of London; that is to say he is in the position of an invitee of the occupier of the premises. The female plaintiff was not using the highway at the time of her injury and the landlords are not liable: *Bromley v. Mercer* (4) and *Caseley v. Bristol Corporation* (5). A landlord who allows a house to become in a ruinous condition is, apart from contract with the tenant, under no liability to the tenant or to the licensees or invitees of the tenant, for any injury which may happen on the premises owing to their want of repair; *Lane v. Cox* (6) and *Cavalier v. Pope* (7).

In the 10th ed. of *Salmond on Torts* the present editor writes at p. 237: "The owner of premises is not *as such* liable for

(1) [1940] 1 K. B. 229.

(2) [1939] 3 All E. R. 663.

(3) [1934] 2 K. B. 56, 66-7.

(4) [1922] 2 K. B. 126.

(5) [1944] 1 All E. R. 14.

(6) [1897] 1 Q. B. 415.

(7) [1906] A. C. 428.

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"nuisances which exist upon them." He then states that it was long ago held in *Payne v. Rogers* (1) that the landlord is liable when the nuisance is due to a breach by him of the covenants in the lease. Sir John Salmond considered this case "unsatisfactory and thought it anomalous that the terms of the contract between landlord and tenant should operate *inter alios*, so as to determine the liability of either of them to third persons." But the author adds the anomaly disappears if we regard the liability as resting on control. "Goddard J. so regarded it in *Wilchick v. Marks* (2)." Lord Esher M.R. (who may be said to be the forerunner of the Law Lords who enunciated the doctrine laid down in *Donoghue v. Stevenson* (3)) in *Lane v. Cox* (4) said: "It has been often pointed out that a person cannot be held liable for negligence unless he owed some duty to the plaintiff and that duty was neglected. There are many circumstances that give rise to such a duty, as, for instance, in the case of two persons using a highway, where proximity imposes a duty on each to take reasonable care not to interfere with the other. So, if a person has a house near a highway, a duty is imposed on him towards persons using the highway; and similarly there is a duty to an adjoining owner or occupier and, if by the negligent management of his house he causes injury, in either of these cases, he is liable. In this case, the negligence alleged is the letting the house in an unsafe condition. It has been held that there is no duty on a landlord, by his relation to his tenant, not to let an unfurnished house in a dilapidated condition, because the condition of the house is the subject of contract between them. If there is no duty in such a case to the tenant, there cannot be a duty to a stranger." See also the judgment of Lopes L.J. in the same case (4).

[Lord Goddard C.J. Real property has come to be very much in the position of an exception to the principle laid down in *Donoghue v. Stevenson* (3).] That principle is expressly limited to the distribution of chattels in circumstances which prevent the distributor or the ultimate purchaser from discovering, by inspection, any defect. See Winfield's Text-book on the Law of Tort (3rd ed.), at pp. 543-4.

Stephen Chapman in reply. The essential feature in this case is that at the instance of the landlords this forecourt was opened up for the use of those on the highway. If the plaintiff

(1) (1794) 2 H. Bl. 350.

(3) [1932] A. C. 562.

(2) [1934] 2 K. B. 56.

(4) [1897] 1 Q. B. 415, 417.

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had deviated from the highway to avoid an obstruction and had fallen owing to the dangerous state of the forecourt she could have recovered : *Owens v. Thomas Scott & Sons (Bakers), Ld. and Wastall* (1). [Berryman K.C. The forecourt in that case was found not to have been demised by the owner. It remained in his occupation.] The plaintiff fell in this case when using the highway, in the sense that she was returning to the highway. On the facts of this case it is submitted that the principle laid down in *Lane v. Cox* (2) and *Cavalier v. Pope* (3) takes effect at the shop doorway. [Lord Goddard C.J. This forecourt was part of the premises of the invitor : it was not a part of the highway.] An occupier of land adjoining a highway is not entitled in using his land to make any erection or excavation thereon so as to render the highway unsafe to persons using it with ordinary care : *Barnes v. Ward* (4) and *Crane v. South Suburban Gas Co.* (5).

Cur. adv. vult.

June 27. LORD GODDARD C.J. in a written judgment held that the female plaintiff was an invitee of the tenant and found that her fall was due to the uneven and dangerous surface of the forecourt and that she was not guilty of contributory negligence. On these findings he held that the tenant was liable and continued : The question of the liability of owners of property of which they are not in occupation has been the subject of many cases, none of which are exactly similar to this, and the case seems to me to raise a point of some importance in a branch of the law which often presents difficulties. The plaintiffs seek to make the defendant landlords liable, relying particularly upon the case of *Wilchick v. Marks and Silverstone* (6). Before however, I turn to the authorities, I desire to make it clear that this accident happened to a person who was visiting the tenant's shop and while she was within its curtilage. It is not a case where a pedestrian on the highway steps aside for one reason or another on to adjoining land which is in an unsafe condition, and thereby meets with an accident. In going to the shop Mrs. Howard was an invitee but she was an invitee of Mr. Crisp and not of his landlords. The landlords were under no duty to her to keep the premises in repair.

As the law stands at present it is clear that a landlord who

(1) [1939] 3 All E. R. 663.

(2) [1897] 1 Q. B. 415.

(3) [1906] A. C. 428.

(4) [1850] 9 C. B. 392.

(5) [1916] 1 K. B. 33.

(6) [1934] 2 K. B. 56.

lets or allows a house to become in a ruinous condition is under no liability, either to the tenant or to the licensees or invitees of the tenant for any accident which may happen on the premises owing to their want of repair. He may, of course, be liable to the tenant if he has undertaken to repair and has failed in his obligation, but no liability can attach to him for accidents which may happen to the tenant's guests or customers because no duty is owed by the landlord to them by contract or otherwise. I need only cite *Lane v. Cox* (1), *Cavalier v. Pope* (2) and *Bromley v. Mercer* (3). The case of *Wilchick v. Marks and Silverstone* (4), however, has decided that a landlord is liable to a person using the highway if, having the right to repair, he fails to exercise it and allows the property to get into a dangerous condition in consequence of which a passer-by is injured. In that case a landlord who had retained the right to do repairs, and had put no obligation on the tenant to repair, allowed a shutter to get into a dangerous condition. The shutter fell and injured the plaintiff, who was walking past the house, and it was held that she was entitled to recover on the ground of nuisance. A more recent case of *Heap v. Ind Coope and Allsopp, Ltd.* (5), approved that case but also decided that it was not necessary, as I had thought in *Wilchick v. Marks and Silverstone* (4) that the landlord should know of the defective state of the premises, but that he was liable whether he knew or whether he did not. But as I have already said, *Wilchick v. Marks and Silverstone* (4) was a case relating to a passenger on a highway, and in the course of my judgment in that case I said (6): "Clearly if the plaintiff had been a visitor to the premises she would have had no cause of action against the landlords, as no duty was owed to visitors by the landlords any more than to the tenant." In this case the plaintiff was a visitor or invitee of the tenant. Mr. Chapman sought to put the case on the ground that the plaintiff was in fact a user of the highway, that she was about to get on to it and the accident happened while she was so doing, and he endeavoured to support his case by reference to the well-known series of authorities which decide that if a person creates a danger whether by excavation or otherwise on land immediately adjoining the highway, he is liable to a person who may inadvertently step off the highway, and who would thus, at

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(1) [1897] 1 Q. B. 415.

(2) [1906] A. C. 428.

(3) [1922] 2 K. B. 126.

(4) [1934] 2 K. B. 56.

(5) [1940] 2 K. B. 476.

(6) [1934] 2 K. B. 66.

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once, be liable to be injured. This seems to me really to amount to the same argument as that which was unsuccessful in *Bromley v. Mercer* (1). There the defendants were the owners of a house and yard abutting on a highway and separated therefrom by a wall which was in such a defective state of repair as to constitute a public nuisance to the highway. The defendants were liable to maintain and keep the outside of the premises in good repair and condition. The plaintiff, who was visiting the tenant of the premises, was in the yard and was injured by a heavy stone falling from the wall upon her. It was held that she had no cause of action against the landlords.

It was argued that she would have had an action if she had been walking along the road and the wall had then collapsed upon her. It was held in the court below that because the child was near to the highway she was entitled to recover, although she was in the yard and not upon the highway, but the Court of Appeal held that it was wrong to say that where there was a nuisance to the highway everyone who comes in proximity to it has a right of action which he can carry about with him on to private premises. If the accident happens while the person is using the highway, he has an action, not in negligence but in nuisance, because he has suffered particular injury from the adjoining danger which interfered with the free use of the highway by the public, that is to say, from a public nuisance.

It may well be, in this case, that had Mrs. Howard been walking along the pavement and had inadvertently or for the purpose of avoiding some obstruction stepped on to the defendant's forecourt, which had nothing to fence it from the highway, and had fallen owing to its defective state, she might have been able to recover as did the plaintiff in *Owens v. Thomas Scott & Sons (Bakers), Ltd. and Wastall* (2); but here she met with the accident while she was still the invitee of the tenant whose premises she was at that time leaving. If she were entitled in this case to recover against the landlords, I can see no reason why a person leaving a house, abutting on a highway, who was injured by the defective condition of the step should not also have an action, and yet that would be entirely contrary to the line of authority of which the cases I have cited above are instances. It may be that the law is not entirely satisfactory on this point. No doubt it is difficult for a layman to understand why, if he is walking along the road and slips into an excavation at the side, he should be entitled to

(1) [1922] 2 K. B. 126.

(2) [1939] 3 All E. R. 663.

recover, whereas if he slips into the excavation as he is endeavouring to get on the road he is not. But I must take the law as I find it, and I have come to the conclusion that it is not possible for me to hold that the plaintiffs have a cause of action against the landlords. Accordingly, they will have judgment against the defendant, Crisp, for 455*l.* 13*s.* 6*d.* and there will be judgment for the other defendants against the plaintiffs.

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Judgment accordingly.

Solicitors for plaintiffs : *L. Bingham & Co.*

Solicitors for landlords : *Berrymans.*

Solicitors for tenant : *Warren & Co.*

C. G. M.

JAMES *v.* MINISTER OF PENSIONS.

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July 9, 28.
Denning J.

Pensions appeals—Application for leave to appeal—Application out of time—Extension of time for appealing—Refusal by pensions appeal tribunal—Jurisdiction of court to grant extension of time and leave to appeal—Pensions Appeal Tribunals Act, 1943 (6 & 7 Geo. 6, c. 39), s. 6—R. S. C. Or. 55E, r. 2 (1.)

Where an application is made out of time to a pensions appeal tribunal for leave to appeal, and the tribunal refuses to grant an extension of time, the judge has jurisdiction to give leave to appeal and to extend the time within which to appeal.

APPLICATION by the widow of a deceased soldier for leave to appeal against the decision of a pensions appeal tribunal notwithstanding that the time within which the application should have been made according to the Pensions Appeal Tribunals Rules had expired.

The following statement of facts is taken from the judgment of Denning J.

Gunner James joined the army on July 24, 1941, at the age of thirty-two. In January 1943, he had a swelling on the right side of his neck which gradually spread. He was sent to hospital, when a diagnosis of Hodgkin's disease was made. In April, 1943, he was discharged on account of it. He claimed a pension. It was rejected by the Minister. In February, 1946, he died on account of the disease. His widow claimed a pension. Her claim was also rejected by the Minister. She

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appealed to a tribunal who, on September 18, 1946, rejected her appeal. She did not apply to the tribunal for leave to appeal within the six weeks allowed by the rules of the tribunal. On November 21, 1946, the case of *Donovan v. Minister of Pensions* (1), which was also a case of Hodgkin's disease was decided in favour of the widow. When knowledge of this decision came to Mrs. James's advisers they sought from the tribunal leave to appeal out of time. The tribunal itself and the President of the Pensions Appeal Tribunals refused the application, refusing to extend the time or to grant leave. The widow now applies for leave to appeal.

Crispin for the applicant. Leave to appeal ought to be granted as this is a similar case to *Donovan's* case (1) which was decided in favour of the widow's claim for a pension, otherwise there will be two decisions on similar facts but with different results. This court is not bound by the Pensions Appeal Tribunals Rules as to the time within which an appeal is brought from the decision of a tribunal but has an inherent jurisdiction to extend the time for appealing if the court considers that necessary in order that justice may be done.

Sir Hartley Shawcross A.-G. and *H. L. Parker* for the Minister of Pensions. Two questions arise in this case: the first is whether this court has any jurisdiction to extend the time for granting leave to appeal from the decision of a pensions appeal tribunal, and secondly, whether leave to appeal ought to be granted in order to clarify the law when otherwise the appeal is out of time. It is a question of fact and not of law whether leave to appeal in a particular case ought to be given. In the opinion of the Minister of Pensions there ought to be some finality with regard to appeals. This court has no jurisdiction to extend the time within which an appeal against the decision of a tribunal must be brought. According to the rules an appeal against a decision of a tribunal must be brought within six weeks. According to r. 2, sub-r. 1 of Or. 55E "an appeal " to the nominated judge for leave to appeal shall not be made " unless an application has been made to the tribunal and has " been refused." That means that unless the application for leave to appeal has been made to the tribunal within the time limited by the rules and been refused, the judge has no jurisdiction to extend the time for granting leave to appeal. The rules expressly provide for the present case whether it is an

(1) (1946) 1 Pens. App. Rep. 609.

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appeal against the decision of the tribunal or against the decision of the President of the Tribunals. The applicant instead of going straight to the judge from the decision of the tribunal went first to the President. The application was thus doubly out of time. There is no provision in the rules for an appeal to the judge from a decision of the President. This matter was considered by the Court of Session in Scotland in the case of *Richardson and Others v. Minister of Pensions* (1) and *White v. Minister of Pensions* (2) in which the court held that where an application is made out of time to a pensions appeal tribunal for leave to appeal to the Court of Session, and the tribunal or President refuses an extension of time, their decision cannot be reviewed by the Court of Session. Those decisions although not binding on this court, nevertheless, ought to be followed in the absence of special reasons. This court has power to extend the time within which applications may be made to the High Court but it has no jurisdiction to extend the time within which applications must be made to a pensions appeal tribunal. There are no merits in the present case. *Donovan's* case (3), which is relied on by the applicant, was a very different case. The real grievance in this case is that having regard to the decision in *Donovan's* case (3) the tribunal might have come to a different conclusion in the present case from that at which they actually arrived, but it would be quite wrong to re-open the present case on that ground. The fact that in a subsequent case a different decision was arrived at is not a ground for allowing an appeal in a case which had already been disposed of. There is nothing to show that the tribunal exercised their discretion in a wrong manner, and, therefore, this application ought to be refused.

Crispin replied.

Cur. adv. vult.

July 28. DENNING J. read the following judgment in which he stated the facts set out above, and continued: Two points arise: First, whether I have any jurisdiction to grant leave; Second, if I have jurisdiction, whether leave should be granted in this case.

The jurisdiction of this court is given by s. 6 of the Pension Appeal Tribunals Act, 1943. The section lays down two essential conditions which must be fulfilled before I have any jurisdiction. The first is that the Minister or the appellant

(1) (1945) 2 Pens. App. Rep. 427. (3) (1946) 1 Pens. App. Rep. 609.

(2) (1945) 2 Pens. App. Rep. 483.

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should be dissatisfied with the decision of the tribunal as being erroneous in point of law. The second is that leave to appeal from the decision should be given by the tribunal or by me. So far as leave by the tribunal is concerned, the procedure is governed by the Pension Appeal Tribunals Rules which are made by the Lord Chancellor under s. 6, sub-s. 1, and the schedule to the Act. Those rules, however, have no application to leave given by me. This court is bound only by the statute and its own rules. The statute in no way limits the time within which I may give leave. The only limitation is that imported by the fact that, if I give leave, the appeal must be lodged "within such time as may be limited by Rules of Court"; but, whenever any time is so limited, this court has power to enlarge the time upon such terms as the justice of the case may require, see Or. 59, r. 16 and Or. 64, r. 7: and the legislature must be deemed to have been aware of this. There is nothing therefore in the statute to limit my jurisdiction to grant leave.

The Minister says, however, that my jurisdiction is limited by an amendment to Or. 55E, r. 2, sub-r. 1, made on July 28, 1944, which says that: "an application to the nominated judge for leave to appeal shall not be made unless an application has been made to the tribunal and has been refused." The Minister says that this rule introduces in effect a third essential condition of my jurisdiction, namely, that an application must have been made to the tribunal within the time limited by the tribunal rules 25, sub-s. 2 and r. 33 and have been refused. I do not think that is the effect of the amended Or. 55E, r. 2, sub-r. 1. That rule, like the other rules of court, is directory and not imperative. This court has an inherent jurisdiction to dispense with any of its own rules of procedure: and this is recognized in Or. 70, r. 1. Even if Or. 55E, r. 2, sub-r. 1, is taken by itself, it can be seen to be directory and not imperative. That is shown by the fact that, if for any good reason, application cannot be made to the tribunal, as for instance, if a member of the tribunal has died or retired or is absent, application can be, and is made direct to me. Furthermore, it has been held in many authorities that Or. 58, r. 17 (which is the rule for the Court of Appeal corresponding to Or. 55E, r. 2, sub-r. 1, for this court) is directory and not imperative and does not deprive the Court of Appeal of jurisdiction to hear an application in the first instance. Finally, if the amended Or. 55E, r. 2, sub-r. 1, were imperative, it would

be ultra vires because it would introduce a third essential condition to my jurisdiction which is not warranted by the statute : whereas if it is directory, there is no such difficulty, because it then deals only with procedure and does not trespass on jurisdiction. I hold, therefore, that it is directory. That means that it prescribes the normal procedure, but leaves it open to me in a proper case to dispense with that procedure. The result is that a claimant who is out of time for applying to the tribunal for leave to appeal should, in the first instance, apply to the tribunal for an extension of time and for leave. If the tribunal extend the time but refuse leave, I clearly have jurisdiction to give leave. If they refuse to extend the time, that refusal does not oust my jurisdiction as the Minister suggests. The statute entrusts this court with a reserve power to grant leave to appeal in proper cases, and this power is not to be cut down by the rules or actions of the Pension Appeal Tribunals. This reserve power has often proved a decisive force in obtaining for servicemen their rights. When I first sat to hear cases under this Act on January 11, 1946, the very first application was by a man named Phillips for leave to appeal after the tribunal had refused to extend the time for applying to them. I heard arguments and held that I had jurisdiction to give leave, and gave it. The effect was decisive. When the appeal came on for hearing on April 1, 1946, the Ministry conceded the claim. Later in that year there was a series of cases in this court and the Court of Session which showed that the tribunals had been acting on the wrong principles. This led to many applications to me for leave to appeal after the tribunals had refused to extend the time. They were in my list for hearing on July 29, 1946. The effect was again decisive. The Minister stated that all men whose claims had been rejected by tribunals up to July 31, 1946, should have the right to have their cases reviewed by the Minister with an appeal to a Special Tribunal. I am told by counsel for the British Legion that this system has worked exceedingly well, and that many men, whose claims had been previously rejected, have now been allowed their rights under the Royal Warrant. Cases have often occurred where I have given leave to appeal after the tribunal have refused it and then the Minister concedes the claim before the appeal comes on for hearing. A striking case occurred the other day. The widow of a warrant officer named Finnerty who died of cancer of the lung, was refused a pension by the Minister and by the tribunal, who refused leave to appeal. I granted leave and when the appeal came on for hearing on July 1, 1947, the Minister con-

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ceded the claim because a careful study of the history showed that the man in the course of his service had been subjected to radium which might have had an influence on the onset or progress of the cancer.

I am aware that the Court of Session in two early cases in 1945, *Richardson's* case (1) and *White's* case (2), took a different view from that which I have taken in *Phillips' case*, and in the present case. I desire to state however, that in my opinion the doctrine of *stare decisis* does not apply in its full rigour to this branch of the law. It is inevitable that, in a field where the law has had to be declared and developed so rapidly, there should occasionally be errors. I do not, therefore, regard myself as absolutely bound by my previous decisions or by those of the Court of Session, but I follow them in absence of strong reason to the contrary. Such a strong reason appeared recently in the case of *Edwards v. Minister of Pensions* (3), in which the Minister did not seek to support the previous decision. Take again, this present case. On May 23, 1945, when the Court of Session decided *Richardson's* case (1) they thought that the tribunal or the President of the Tribunals would extend the time whenever it was just so to do: but experience has shown that that did not happen. The applications that were in my list for hearing on July 29, 1946, contained many cases where the man had a good ground of appeal, but was a few days out of time, owing, not to his own fault, but to oversight or pressure of work on the part of the British Legion or his legal advisers. Nevertheless, the tribunals and the President of the Tribunals refused to extend the time. The experience in Scotland seems to have been similar, see *White's* case (2). In my opinion the statute gives me power to remedy injustice of this kind by myself giving leave to appeal, and this experience affords a strong reason why I should apply the law as I believe it to be, and not hold myself bound by decisions which I believe to be wrong.

Now that I have held that I have jurisdiction to grant leave to appeal, the question arises whether I should grant leave in this case. In considering this question I shall apply the principle stated by the Court of Appeal in *In re Berkeley, decd.* (4). I shall consider the whole of the circumstances and if, in the light of those circumstances, I consider it just to grant leave to appeal, I shall do so. I am aware that in ordinary

(1) 2 Pens. App. Rep. 427.

(3) Ante, p. 564.

(2) 2 Pens. App. Rep. 483.

(4) [1945] Ch. 4.

litigation it is not sufficient for a party to come to the court and say that a subsequent decision of a superior court has determined that the principle of law on which his case was decided was wrong. The circumstances of pension appeals differ, however, from ordinary litigation. The parties are rarely represented before the tribunals by legal advisers. The serviceman usually appears in person or is helped by a British Legion representative. The Minister appears by one of his officers who is not a lawyer. The only lawyer present is the chairman of the tribunal. If the case gives rise to a point of law, the serviceman or the Legion representative cannot be expected to raise it, because they are not skilled in the law. It is the duty of the chairman to raise it and of the tribunal to consider it : because the rules expressly provide that it is the duty of the tribunal to assist any appellant who appears to them to be unable to make the best of his case. Suppose then there is such a point of law which the chairman raises and the tribunal decides against the man without telling him anything more than that his appeal is dismissed, and the point is subsequently discovered by the man, owing to a decision of this court, which shows that it should have been decided in his favour. He is clearly dissatisfied with the decision of the tribunal as being erroneous in point of law. He has not been in fault himself. The only persons who have erred are the tribunal. In such cases, it is only just that he should have leave to appeal. The circumstances are altogether different from ordinary litigation where it is the duty of the party, and not the court, to raise any point of law on which he relies. Here it is the duty of the tribunal and I shall assume that they have done their duty and raised and considered any point of law to which the case gives rise, even though they have not expressly mentioned it.

The present case is a striking example of the principles I have stated. Mr. James in his lifetime put his point shortly and simply : " As I have never known any illness prior to entering " the forces, also as medical science has not been able to find " out how it (Hodgkin's disease) is contracted, I think I have " more right in saying it is due to war service than you have " to say not." His widow after his death relied on that statement in support of her appeal. It involved an important question of law as to diseases of which the cause is unknown, namely, what is the proper direction in point of law as to the burden of proof in such cases ? That question has since been

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considered by me in *Donovan's* case (1) and *Miller's* case (2). In *Donovan's* case (1) which was a case of Hodgkin's disease I allowed the appeal because the tribunal misdirected themselves in point of law. The widow there obtained her pension. The present case is also a case of Hodgkin's disease and the facts seem indistinguishable. Is the result to be different? That raises a difficult question. In many pension cases the facts are indistinguishable. Each of two men is fit when he goes into the army. Each is afflicted during his service with the same disease. It is not right that on identical facts one should be awarded a pension and the other not. Such a difference in result may, of course, be simply due to the personal factor, namely, the difference in constitution of the two tribunals who heard the two cases: but that is unlikely. Nor is any such difference likely so long as the medical evidence is fully and accurately put before each tribunal by the Minister, and each tribunal directs itself properly in point of law. Where there is a difference in result, it is likely to be because the medical evidence was different or because one of the tribunals did not direct itself properly. If it is because the medical evidence was different, I cannot interfere, because no point of law is involved. If it is because the tribunal did not direct itself properly in point of law, I can. In a case where the reason for the difference is uncertain, it seems to me that the matter should come before this court to see whether the tribunal did direct itself properly. It is the only remedy available, because once a tribunal has given a decision, even if it is a wrong one, the Minister has no power to alter it. The remedy is only in this court. Applying this test, the medical evidence in *Donovan's* case (1) was fuller than in this case. Here it was meagre, and I think there is a real question whether the tribunal properly directed themselves as to the burden of proof. It was a case of a rare disease of unknown origin which can only be rightly decided with full medical evidence and a careful direction as to the burden of proof. I give leave to appeal so that the question can be investigated whether they properly directed themselves in point of law.

Leave to appeal.

Solicitors for applicant: *Culross & Trelawney*.

Solicitor for the Minister: *Treasury Solicitor*.

(1) 1 Pens. App. Rep. 609 (2) (1946) 1 Pens. App. Rep. 615.

R. F. S.

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May 5, 9.

Denning J.

Emergency legislation—War injury—Injury caused by explosion of object picked up by applicant—Evidence inconclusive whether object a “missile discharged by enemy or in combating the enemy”—No onus of proof on applicant—Negligence or misconduct of applicant causing or contributing to his injuries—Claim refused—Personal Injuries (Civilian) Scheme, made under Personal Injuries (Emergency Provisions) Act, 1939 (2 & 3 Geo. 6, c. 82).

The applicant, while out walking in Carmarthenshire, picked up in a field an object described as like a piece of piping, and placed it in the pocket of an old army tunic which he was wearing. On the following evening, when in a field near his home in the company of two friends he took the object from his pocket and was examining it when an explosion occurred and he received injuries to his face and both hands. His claim to a pension was refused by the tribunal, who, however stated a case for appeal.

Held, (1.) that the onus of proving that the object in question was “a missile discharged by the enemy” was not on the claimant and though the evidence was inconclusive the tribunal had rightly given him the benefit of the doubt under art. 2 (2.) of the Personal Injuries (Civilian) Scheme; (2.) that there was evidence on which the tribunal could come to the conclusion that the injuries were caused or contributed to by the serious negligence or misconduct of the applicant and the tribunal's decision must be upheld.

WAR INJURY APPEAL.

The applicant, Owen Llewellyn Williams, when out walking on May 20, 1944, in a field on the top of a mountain in Carmarthenshire, picked up a small object, which he described as like a piece of piping of a dull lead colour, and placed it in the pocket of an old army tunic which he was wearing. On the following evening, while in a field near his home in the company of two friends, he took the object, which he admittedly knew to be a missile of some sort, from his pocket, and was examining it, at the same time holding a lighted cigarette, when an explosion occurred, and he received lacerated wounds of the face, right hand and fingers of the left hand. The applicant had served in the Home Guard and knew of the official warning against the danger of possible enemy missiles. His claim for war injury award under the Personal Injuries (Civilian) Scheme was refused by the tribunal, who, however, stated a case for appeal. Before the appeal came on for hearing, however, the applicant withdrew his claim, but the Minister of Pensions desiring to have a decision on the points of law raised by the case, his Lordship consented to hear argument.

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H. L. Parker for Minister of Pensions. Assuming, for the purpose of argument, that the missile was of German origin, in the view of the Minister the injuries sustained by the applicant were not war injuries, their cause being too far removed from any of the matters set out in the statute. The explosion followed the action of the applicant—a *novus actus interveniens*, breaking the chain of causation. The applicant had served in the Home Guard, he admittedly knew that this was a missile of some kind, and he was aware of the warning issued by the authorities against the danger of meddling with such objects. Had the missile exploded while he was taking it to the police his injuries would have been war injuries within the meaning of the statute, but he had put it in his pocket and kept it there till the following day. It must be purely a question of fact in each case. Not every negligent act is sufficient to break the chain of causation, but, quite irrespective of how a man gets the missile in the first place, there must come a time when the negligence is so great that it must break the chain of causation. Alternatively, it is submitted that the applicant has not shown that this missile was either of German origin or used in combating the enemy. Clearly the onus is on the applicant to bring himself within the ambit of the Personal Injuries (Emergency Provisions) Act, 1930. [*Smith v. Davey, Paxman & Co.* (1) and *Minister of Pensions v. Chennell* (2) referred to.]

Cur. adv. vult.

May 9. DENNING J. In this case, Mr. Williams has written a letter to the court dropping all claims, but as the case stated raises questions of law on which the Minister of Pensions desires to have a decision, I have heard argument on it. [His Lordship then stated the facts and continued:] The claim is made under the Personal Injuries (Civilian) Scheme made under the Personal Injuries (Emergency Provisions) Act, 1939. If his incapacity for work or disablement is caused by a "war injury" he is *prima facie* entitled to a pension. In considering whether it was a "war injury," the first question is, whether this was a missile discharged by the enemy, or in combating the enemy, or in repelling an imagined attack by the enemy. There is no evidence that there had been any bombs dropped by the enemy in this vicinity, or that any of our troops had been in action against the enemy there or, indeed, of any "incident" in the

(1) (1943) 36 B. W. C. C. 60.

(2) Ante p. 250.

locality. All that the evidence showed was that the object was lying in a field on the top of a mountain about fifty yards from a pillbox. Its appearance was like a piece of dull lead-coloured piping, it was two to two and a half inches long and about one and half inches in diameter. One end was milled; the other end was smooth. There was no fuse attached to it. In the field where the explosion took place police found portions of some metal object marked "P.O.B.W. 2209." They were found some few yards from the place where the explosion took place, and they were of a dull coloured alloy. They were inspected by a major of the Home Guard, who stated that they were not portions of anything used by the Home Guard. They were also inspected by an inspector of the War Emergency Department, Llanelly, by the bomb disposal unit at Swansea, and by the garrison engineer at Llanelly. None of these investigations produced any definite results. The policeman who found it said that he was satisfied that the missile had not been buried, it was free from rust and appeared quite new. The police told the claimant that the object was not of British origin.

On this part of the case much depends on the burden of proof. By art. 2 (2.) of the scheme: "In no case shall there be an onus on any claimant to prove that incapacity for work or disablement was caused by or that death was the direct result of a qualifying injury, and the benefit of any reasonable doubt on these questions shall be given to the claimant."

That article in the Personal Injuries Scheme corresponds to art. 4 (2.) of the Royal Warrant and to similar articles in the schemes relating to the Merchant Navy and other persons under the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939. These articles must be read with ss. 1, 2 and 3 of the Act of 1943. The similarity of wording shows that on the questions that come before the tribunals under those sections there is to be no burden of proof on the claimant and the benefit of any reasonable doubt is to be given to him. On the narrow question whether the incapacity for work or disablement was caused by the injury, it is plain there is no burden on the claimant. But the real question is whether the incapacity or disablement was caused by a "qualifying injury." That includes the question whether the injury was a "qualifying injury," that is, in this case, a "war injury." Where is the burden on that question? It is a question which has to be decided by the tribunal under s. 3 of the Act; and it seems

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to me that on that question, as on the other questions, there is no burden on the claimant, and the benefit of any reasonable doubt must be given to him. Applying that in this case, the evidence is very inconclusive. It may be that the object was a missile discharged by the enemy, but there is a reasonable doubt on the point. The tribunal were right to give the claimant the benefit of the doubt and to find that it was a missile discharged by the enemy.

Assuming that the missile was discharged by the enemy, the next question is whether the injuries to the claimant were caused by it being so discharged. That depends on whether the case falls within the decision of *Smith v. Davey Paxman* (1) or that of the *Minister of Pensions v. Chennell* (2). As I stated in *Chennell's* case (2), intervening negligence or misconduct does not of itself break the chain of causation. The Personal Injury Scheme, indeed, and the Pensions Appeal Tribunals Act, 1943, both contemplate that even serious negligence and misconduct may not break the chain of causation, because under s. 6 of the scheme and s. 4 of the Act, serious negligence or misconduct is made a ground on which the Minister may withhold, cancel or reduce an award, a question which would not arise unless the chain of causation was intact. This leads to a just result, because, if the chain of causation is broken, innocent passers-by who are injured would have no recompense under the scheme, whereas, so long as the chain of causation is intact, they may be compensated, but the person who is guilty of serious negligence or misconduct may not.

The distinction between the two cases cited is this: In *Smith v. Davey Paxman* (1) everyone concerned knew that the cannon shell was from an enemy aeroplane. The man who sawed it at his bench was doing a deliberate act in which the origin of the shell was only part of the history. It would have been all the same if it had been an explosive coming from a source unconnected with the war. In *Chennell's* case (2), however, the intervening action was that of children acting in the irresponsible way in which children do act. In the present case, Mr. Williams was not doing a deliberate act such as the workman in the *Smith v. Davey Paxman* case (1); he was only examining a strange object in the way in which a careless man might do. If he had been taking it to the police station and was examining it on the way when it exploded both he and any passers-by would have been entitled to compensation. The fact

(1) (1943) 36 B. W. C. C. 60.

(2) Ante p. 250.

that he was not taking it to the police station but was examining it in a field may mean that he was guilty of negligence, but does not break the chain of causation. The fact that he was also holding a lighted cigarette may render his negligence so serious as to disentitle him to any compensation, but, again, it does not break the chain of causation so as to prevent an innocent person who may have been injured by the explosion from recovery. I hold, therefore, that this case, on this point, falls within *Chennell's* case (1) rather than that of *Smith v. Davey Paxman* (2). The tribunal found that it was a war injury and I see no error in law in that finding.

The remaining question is whether the injuries were caused or contributed to by the serious negligence or misconduct of Mr. Williams. The tribunal found that they were. There was evidence on which they could come to that conclusion and there is no ground upon which I should interfere. The result is that I uphold the decision of the tribunal on all points.

Solicitor for Minister of Pensions: *Treasury Solicitor*.

(1) Ante p. 250.

(2) 36 B.W.C.C. 60.

A. W. G.

Affirmed. C.A. [1948] 1 All E.R. 713.

DICKSON v. HURLE-HOBBS (DISTRICT AUDITOR).

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May 2, 12.

Local government—Audit—Surcharge—Powers of district auditor—Loss or deficiency—“Any person”—Local Government Act, 1933
(23 & 24 Geo. 5, c. 51), s. 228, sub-s. 1.

Lord Goddard
C.J.,
Atkinson and
Oliver JJ.

The duty of a district auditor under the Local Government Act, 1933, is to check the accounts of the local authority whose accounts he is auditing and he has no power to surcharge any person who is not a member, officer or servant of that authority.

Where, therefore, a local authority, who had entered into a contract with a company for the repair and maintenance of certain vehicles, suffered a loss through the fraud of the managing director of the company:—

Held, that the district auditor had no power to surcharge the managing director with the amount of the loss.

APPEAL under the Local Government Act, 1933, s. 229.

In January, 1941, the London County Council entered into a contract with a company for the repair and maintenance of vehicles used for civil defence purposes. After about three

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years it was discovered that certain accounts sent in by the company were wrong in that time charged for therein was grossly overstated. The appellant, who was managing director of the company at the time, was prosecuted for obtaining money by fraud and was convicted. The respondent, the district auditor, in estimating the loss suffered by the council, came to the conclusion that the council had been defrauded of at least 20,000*l.* He thereupon served on the appellant a notice in the following terms: "In auditing the accounts for the three years ended March 31, 1944, of the London County Council, it appears to me that the funds of the said council have incurred a deficiency or loss, particulars of which are given on the back hereof. Upon the evidence before me, I am inclined to the view that you are responsible either wholly or in part for the said deficiency or loss. In order to afford you an opportunity of being heard on the subject before I decide whether it is my duty to surcharge you with the said amount or some portion thereof, I beg to inform you that I have adjourned the audit so far as it relates to this matter to Wednesday, June 19, 1946. Particulars: Loss occasioned to the London County Council by your misconduct in improperly making inflated claims upon the said council and obtaining payment thereon in excess of that lawfully due to you to the extent of at least 20,000*l.*" The appellant's solicitors requested particulars of the evidence on which the proposal to surcharge the appellant was made, but this was refused by the respondent, who fixed June 26, 1946, for hearing the appellant. On that date counsel appeared on behalf of the appellant. The respondent stated that he was satisfied on the evidence before him that there had been a very serious overstatement by the company of the hours expended and that he had endeavoured to make a correct estimate of the probable amount of the loss and the cost in relation to repairs. He explained how he had done it and referred to the evidence of five witnesses. He further stated that it was open to the appellant, if he wished, to show quite conclusively that his figures were wrong. Counsel then stated that he was not in a position to deal with the matter, since he had neither seen nor heard the evidence relied on and had had no opportunity of cross-examining the witnesses. The respondent offered the appellant a further opportunity of being heard, but this was declined and the surcharge was certified on September 20, 1946. The appellant appealed.

Scott Henderson K.C. and *Garland* for the appellant. The auditor had no power to surcharge the appellant, who was not a member or a servant of the council. His power was limited to officers of, or persons employed by, the council. In *Rex v. Roberts* (1), which was decided under s. 247, sub-s. 7, of the Public Health Act, 1875, *Fletcher Moulton L.J.* expressed the view that the auditor's powers to surcharge were limited to surcharging the persons who brought in the accounts for audit. *Cozens-Hardy M.R.* and *Farwell L.J.*, on the other hand, were of opinion that the auditor could decide whether any member or officer of the council had been guilty of negligence or misconduct in relation to the accounts and charge such member or officer with the amount of the loss. Since the wording of that section of the Public Health Act, 1875, has now been changed in s. 228, sub-s. 1 (d), of the Local Government Act, 1933 (2), by substituting the words "any person" for "any person accounting," it is not contended that the auditor could not properly surcharge any officer, member or servant of the council by whose negligence or misconduct a loss has been incurred. But it would not be right that he should be able to surcharge persons who were not members, officers or servants of the council. He has no authority to summon such a person to appear before him and such person would have no right to hear the evidence against him or to cross-examine witnesses upon it.

Pritt K.C. and *Harold Williams* for the respondent. An auditor has jurisdiction to summon the members, officers or servants of a council before him and to find them guilty of fraud. They are not bound to attend, but must produce documents. No one has challenged that jurisdiction except *Fletcher Moulton L.J.* in *Rex v. Roberts* (1). There is no reason why such jurisdiction should not extend to persons who stand in a relation to a local authority which calls on them for diligence or good conduct on some special ground, other than the general duty resting on every citizen, for instance, persons standing in a contractual relation to the local authority. In that sense, in the present case, the respondent was a person who had to account to the council. There was a contract

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(1) [1908] 1 K. B. 407.

(2) Local Government Act, 1933, s. 228, sub-s. 1: "It shall be the duty of the district auditor at every audit held by him . . . (d) to surcharge the

"amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred . . ."

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between the company, of which he was managing director, and the council, which made the company an accounting party. The only question is whether the respondent himself could be said to be an accounting party. It is submitted that he could, since he was in effect the company. Therefore, on the proper construction of s. 228 of the Local Government Act, 1933, he could rightly be surcharged with the amount of the loss.

Lloyd-Davies (Sir Valentine Holmes K.C. with him) for the London County Council adopted the arguments of *Pritt K.C.*

Scott Henderson K.C. replied.

Cur. adv. vult.

May 12. The judgment of the court was read by ATKINSON J. : Mr. Scott Henderson's first point was that the surcharge was wholly misconceived, and that a district auditor has no power to surcharge anyone other than members, officers and servants of the authority whose accounts he has to audit. That is the only point which has been argued, and we thought it desirable to deal with it before going into the merits. The claim by the auditor is certainly startling. If he considers that the London County Council has a cause of action against any person, the council need not bring an action to enforce the claim, when of course the claim would have to be proved, but the auditor can deal with it by the simple process of surcharging the person with the amount of the claim leaving it to him to come to the court to disprove the liability so imposed. The objectionable nature of such a proceeding is made plain by one of the remarks of the respondent to counsel for the appellant. The respondent said : " I do appreciate that there " is always some difficulty about audit procedure, because of " course the auditor is in the unenviable position of being, so " to speak, the judge and the prosecutor."

The respondent bases his claim to be entitled to surcharge Dickson on s. 228 of the Local Government Act, 1933. It is the respondent's view, or at any rate his contention, that " any person " means any person, whether a member, officer or servant of the council or not, and that everybody is subject to his jurisdiction in just the same way as those whose accounts he is there to audit. Mr. Pritt felt the difficulty of contending for a power to surcharge unrestricted as to the class of persons

who could be so dealt with. He was asked this question: If the auditor came across an expenditure on the repair of a vehicle belonging to the London County Council and was told that that repair was rendered necessary by a collision with a van belonging to, say, Carter Paterson, did he contend that the auditor could forthwith surcharge the company for the expense so incurred? The answer was "No," and the claim was then put in these words, "that 'any person' meant any 'person who stands in a relation to the local authority which 'calls upon him for diligence or good conduct on some special 'ground other than the general duty resting upon all members 'of the community.'" There is nothing in the section on which to found such a definition of "person." Contract would seem, at any rate generally, to be the basis of special relationships, yet loss due to breach of contract is not mentioned in s. 228 as a loss which can be surcharged.

The power of a district auditor to surcharge was, we think, first conferred by s. 32 of the Poor Law Amendment Act, 1844, where the relevant words were: "and such auditor shall 'charge in every account audited by him the amount of any 'deficiency or loss incurred by the negligence or misconduct of 'any person accounting, or of any sum for which any such 'person is accountable, but not brought by him into account 'against such person, and shall certify," etc. This was replaced by s. 247 of the Public Health Act, 1875, the relevant words being: "shall charge against any person accounting the 'amount of any deficiency or loss incurred by the negligence 'or misconduct of that person, or of any sum which ought to 'have been but is not brought into account by that person." Section 228 of the Act of 1933 omits the word "accounting." The auditor's claim is based on that omission. It certainly was never suggested that under the Act of 1844 or the Act of 1875 the words "persons accounting" could include persons accounting to, or liable to account to, the local authority. Clearly the words referred to accounting which fell to be audited. The meaning of the words was considered in *Rex v. Roberts* (1). In that case the auditor had surcharged certain members of the highway committee of the council with several sums representing losses incurred by the council in respect of contracts for horse forage and crushed ballast because the highest instead of the lowest of several tenders had been accepted. The assistant engineer had been included for a sum

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representing the price of four hundred and ten yards of material in excess of the quantity actually delivered and also in respect of the crushed ballast. The persons surcharged obtained rules nisi for a certiorari to bring up and quash the surcharges and this court made the rules absolute. The auditor appealed without success. The interest of the case lies in the views expressed as to the meaning of the words "person accounting," whether they were wide enough to include any member or officer of the local authority whose accounts were being audited or whether the words covered only those officers actually bringing in the accounts for audit. The court were divided in their views. Lord Cozens-Hardy M.R. took the view that the words were wide enough to enable any officer or servant of the local authority to be surcharged. He said (1): "Strictly speaking, such a person would not be a person bringing in an account subject to audit and therefore liable to be surcharged in such account. But I think 'surcharge' is used in a less technical sense and is equivalent to 'charge'; and this enables me to reach the conclusion that the words 'any person accounting' in the second limb of the sub-section are wide enough to include any member of the local authority whose accounts are before the auditor." Farwell L.J. took the same view, although he arrived at it in a slightly different way. He said (2): "'The person accounting' refers back to the line before, 'the person making or authorizing the making of' the payment, showing that 'accounting' is not confined to figures submitted to audit, but extends to conduct for which any committee or officer is liable to be called to account." Fletcher Moulton L.J. took a different view. His view, as expressed in the headnote, was: "The powers and duties of the auditor under sub-s. 7 of s. 247 are strictly confined to auditing, and the words 'person accounting' in that latter part of that sub-section, which requires the auditor to 'charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person,' mean the person who brings in accounts for audit. Therefore, where the accounts submitted for audit are the accounts of a metropolitan borough council, the person accounting is the council, and the auditor has no power to inquire into the negligence or misconduct of the individual members or servants of the council."

(1) [1908] 1 K. B. 418.

(2) Ibid. 440.

In our view, in all probability the word "accounting" was omitted from the Act of 1933 to negative the strict interpretation put on the words by Fletcher Moulton L.J. and to make it clear that the interpretation of the Master of the Rolls and Farwell L.J. was intended by Parliament. It is unthinkable that Parliament intended by the omission of a single word to make so startling and drastic a change in the law as to give a district auditor the power to make and adjudicate upon claims by the local authority of which he is auditor against third parties who have nothing whatever to do with the accounts he is auditing, and to do that by a procedure which gives the third party no right to hear and challenge the evidence against him, and no right to subpoena witnesses. The words must be interpreted in the light of ss. 219 and 241. The auditor is there to audit accounts. He is there to be a watchdog upon the local authority, its officers and servants. He is there to check their accounts and saddle the appropriate members and officers with loss for which they are responsible. The words "negligence or misconduct" are very apt to describe and cover the grounds upon which members and servants of an authority can become indebted to the authority. Misconduct is not a word normally applied to a claim against a third party. If claims against third parties were intended to be covered, surely breach of contract would find a place in the section. In the view of this court, the district auditor has no power to surcharge anyone who is not a member, officer or servant of the authority whose accounts are being audited. We are told that this is not the first time that the district auditor has surcharged persons other than those I have indicated. We think he would be well advised if he stuck to his auditing and ceased to make claims on members of the public and thereupon to adjudicate on them, thereby usurping the functions of the courts. The appeal succeeds with costs.

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Appeal allowed.

Solicitors for appellant : *Alfred C. Warwick & Co.*

Solicitors for respondent : *Sharpe, Pritchard & Co.*

Solicitor for London County Council : *J. H. Pawlyn.*

H. A. P.

C. A.

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May 16.

OAK PROPERTY COMPANY LIMITED v. CHAPMAN AND ANOTHER.

Somervell and
Evershed L.JJ.
and
Wynn-Parry J.

Landlord and tenant—Rent restriction—Part of premises sub-let by statutory tenant—Validity of sub-lease—"Lawfully sub-let"—Landlord's acceptance of rent with knowledge of statutory tenant's breach of covenant—Principles of waiver—Extent of application to statutory tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 15, sub-s. 3—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (13 & 14 Geo. 5, c. 32), sch. I, para. (d).

A statutory tenant who sub-lets part of his premises thereby confers on the sub-tenant an interest in the premises bringing him within the protection afforded to sub-tenants by s. 15, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1), if, at the material date, the statutory tenant retains a sufficient possession of or interest in the remainder of the premises to preserve his own rights as statutory tenant, the material date for this purpose being that on which the landlord brings proceedings against the sub-tenant for possession alleging that no valid sub-tenancy was created.

The right given to a landlord by para. (d) of sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (2), to invoke the jurisdiction of the court if, without his consent, the statutory tenant sub-lets part of the premises, the remainder being already sub-let, does not render the second sub-letting a nullity for all purposes. Even if, which *quære*, such a sub-letting is ineffectual in law at the time when it is made, it may have become effectual, through a change of circumstances, by the date on which the landlord brings his action for possession.

The principles of waiver applicable to a common-law tenancy where the landlord continues to accept rent from his tenant after

(1) By s. 15, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 :

"Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the

"same terms as he would have held from the tenant if the tenancy had continued."

(2) By para. (d) of sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, a landlord is entitled to invoke the jurisdiction of the court if "the tenant without the consent of the landlord has . . . assigned or sub-let the whole of the dwelling-house, or sub-let part of the dwelling house the remainder being already sub-let."

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

acquiring knowledge of the latter's breach of covenant are applicable in part also to a statutory tenancy. The question whether in any given case the acceptance of rent by a landlord from a statutory tenant with knowledge of the latter's breach of covenant is an unequivocal act of affirmation of the tenancy is one of fact for the county court judge to determine, and if he decides the question affirmatively then the ordinary legal consequences would *prima facie* follow. But, though at common law even a qualified acceptance of rent by the landlord with knowledge of the tenant's breach operates as a waiver, such an acceptance in the case of a statutory tenancy does not necessarily have that effect: a landlord who has acquired full knowledge of a non-continuing breach of covenant by a statutory tenant, and thus has a right, under para. 1 (d) of sch. I to the Act of 1933, to invoke the jurisdiction of the court, may thereafter accept rent without being deemed to have waived the breach so long as he makes it clear to the statutory tenant, at the time of or before that acceptance, that he accepts it without prejudice to his right to go to the court, and provided that he issues his summons for possession within a time held to be reasonable by the court before which the summons comes.

Having sub-let part of the premises furnished, a statutory tenant sublet the remainder unfurnished without the consent of the landlord and in breach of a covenant in the lease. The landlord brought proceedings for possession against the sub-tenant on the ground that no valid sub-tenancy had been created, but, by the date of those proceedings, the statutory tenant had regained possession of that part of the premises which she had sub-let furnished. The landlord accepted two payments of rent from the statutory tenant after acquiring knowledge of her breach of covenant, and the statutory tenant regarded that acceptance as indicating that her position was secure. On the landlord's claim for possession from the sub-tenant and the statutory tenant, the latter having submitted to judgment:—

Held, (1.) that the sub-letting, whatever the position before, became effective on the statutory tenant's regaining possession of the part of the premises which had been let furnished, and that, as she had that possession at the date of the landlord's action, the sub-tenancy was valid and the sub-tenant was within the protection of s. 15, sub-s. 3, of the Act of 1920; (2.) that the landlord's acceptance of rent from the statutory tenant after he knew of the latter's breach of covenant had taken place in circumstances amounting, and understood by the statutory tenant to amount, to affirmation of the tenancy, that the landlord must therefore be deemed to have waived the breach, and that the claim to possession against the sub-tenant must accordingly fail.

Quære, whether the second sub-letting would have been effective to protect the sub-tenant if, at the time when the proceedings were begun, the first sub-tenant had still been in possession of the other part of the premises, having regard to the fact that that part contained the statutory tenant's furniture.

Roe v. Russell [1928] 2 K. B. 117 considered.

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By an agreement in writing, dated May 4, 1942, a flat, No. 5, Arkwright Mansions, Finchley Road, Hampstead, subject to the Rent Restriction Acts, was let by the plaintiff company to the first defendant, who, at the material time, was a statutory tenant holding on a three-monthly tenancy at 159*l.* 9*s.* 8*d.* a year. The lease provided that the tenant should not sub-let the flat or any part of it without the landlords' consent, and gave them a right of re-entry for her breach of covenant. In March, 1945, the statutory tenant sub-let all but two rooms of the flat furnished to a Mrs. Jacobson. On March 1, 1946, the statutory tenant let the two rooms to the second defendant unfurnished. That sub-letting came to the knowledge of the plaintiffs' managing agents some two weeks later. On April 24 and May 13, 1946, the landlords' agents accepted two payments of rent from the statutory tenant. On August 1, 1946, Mrs. Jacobson gave up her tenancy and vacated her part of the flat, the statutory tenant's furniture remaining in it. On August 20 the landlords brought this action against the statutory tenant and the sub-tenant for possession. The statutory tenant submitted to judgment.

The county court judge dismissed the action as against the sub-tenant, and the landlords now appealed.

Safford K.C. and *Neligan* for the landlords. The question is whether the sub-tenant here can bring herself within s. 15, sub-s. 3, of the Act of 1920, as a person to whom the premises have been "lawfully sub-let." It is clear that, so long as a statutory tenant retains possession of any part of the premises, the landlord cannot turn him out of that or any other part of them: *Roe v. Russell* (1). The statutory tenant by purporting to sub-let part of the house gives the sub-tenant a right to keep that part of the house so long as the statutory tenancy exists. The sub-tenant, having acquired something by the sub-letting, immediately acquires through the Act rights of his own. But he must first have, by the purported sub-letting, acquired something which the Act can operate to extend. [*Wilkins v. Carlton Shoe Co., Ltd.* (2) and *Skinner v. Geary* (3) referred to.]

Where, however, the statutory tenant sub-lets part of the premises, the remainder being already sub-let to someone else, the sub-tenant does not, it is submitted, acquire any interest which the Rent Restriction Acts will clothe with any rights.

(1) [1928] 2 K. B. 117.

(3) [1931] 2 K. B. 546.

(2) [1930] 46 T. L. R. 415.

The statutory tenant has, under the Acts, nothing more than a right to possession. The moment he sub-lets part of the premises the remainder being already sub-let, he parts with his possession of the premises, and the foundation for any grant of rights to the new sub-tenant disappears. The statutory tenant having by the second sub-letting abandoned both possession and the right to possession of the premises, that sub-letting is necessarily a nullity, for in the moment of sub-letting he ceases to have the status necessary for conferring any rights on the sub-tenant. The sub-tenant here cannot, therefore, be a person to whom the premises have been lawfully sub-let within the meaning of s. 15, sub-s. 3, and the landlords are, accordingly, entitled to possession. [*Sutton v. Dorf* (1) referred to.]

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Next, the county court judge was wrong in holding that the landlords waived their rights against the sub-tenant by the acceptance of rent from the statutory tenant. This is not the case of a common-law tenancy, where the principles of waiver by acceptance of rent are strict as against the landlord. In the case of a statutory tenancy no inference can be drawn against the landlord by his continuing to accept rent with knowledge of a breach of covenant, for the payment of rent by a statutory tenant is a statutory duty. It is the very thing which he must do, and if he fails to do it the landlord can go to the court. In any event, the landlord is entitled to go to the court on the commission of any breach of covenant by the statutory tenant. The mere fact that he accepts rent once he has that right to invoke the jurisdiction of the court cannot be taken as an election not to invoke it. The court can, in any event, only make an order against the statutory tenant if it considers it reasonable to do so. Continued acceptance of rent by the landlord with knowledge of the breach for a long period would no doubt go to reasonableness, but the acceptance of rent in these circumstances cannot by itself operate as a waiver, and the two acceptances would not make it unreasonable for the court to make an order. The acceptance of rent here cannot, it is submitted, be held to transform the unlawful sub-letting into a lawful one unless it is taken against the landlord in the strict sense in which it would be taken against him in a common-law tenancy.

If the landlord makes up his mind to apply to the county court for an order for possession, what he claims in money is properly called rent, even in respect of the period between the date of the

(1) [1932] 2 K. B. 304.

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summons and the date on which the order takes effect. The issue of the summons does not destroy the relationship of landlord and tenant; therefore, money which the landlord receives from his statutory tenant after the summons retains its character as rent; it does not become mesne profits. What difference can it make that a landlord accepts a week's rent before he takes out his summons in which he claims rent?

There is no authority on this point, but it is surely a logical result from the fact that the statutory tenant is under a statutory obligation to pay his rent that the landlord's acceptance of it cannot be taken against him as waiver of the breach. If it is the statutory duty of the statutory tenant to pay the rent, can it ever be the landlord's duty not to accept it? He cannot escape accepting it in view of the statutory position. [*Wright v. Arnold* (1) referred to.]

Heathcote-Williams for the sub-tenant. The first question is what is the position of a statutory tenant who does something which he is not entitled to do by the terms of his lease. It is argued for the landlords, relying on the judgment of Scrutton L.J. in *Skinner v. Geary* (2), that he places himself thereby outside the precincts of the Acts. But if, on committing a breach, the statutory tenant ceases to have any rights at all, what is the position if the landlord goes on accepting rent afterwards? The only possible answer would seem to be that the statutory tenant continues as such until he ceases to be it by the order of the court. [*Brown v. Draper* (3) referred to.] The fact that the sub-letting to the defendant sub-tenant was at the time outside the Act because the rest of the premises was then sub-let to Mrs. Jacobson is irrelevant, for at the date when the summons was issued the last-mentioned sub-tenancy had come to an end. It is the date when the proceedings for possession are instituted which is material, and on that date the statutory tenant was in possession of part of the premises by her furniture. [*Prout v. Hunter* (4), *Maley v. Fearn* (5) and *Watson v. Saunders-Roe, Ltd.* (6) referred to.] If the landlords are right in their contention that the statutory tenant lost all rights in the premises by going out of possession, then their subsequent acceptances of rent would make him a contractual tenant. It is conceded that the sub-letting to the defendant sub-tenant on March 1 was at the time a sub-letting

(1) Ante p. 280.

(2) [1931] 2 K. B. 546.

(3) [1944] K. B. 309, 315.

(4) [1924] 2 K. B. 736.

(5) [1946] W. N. 198; 62 T. L. R. 693.

(6) Ante p. 437.

of the whole dwelling-house and so unlawful because in breach of the original contract of tenancy. It was not, however, unlawful as being contrary to para. (d) of the sch. I. to the Act of 1933, but unlawful as being contrary to the contract of tenancy. A distinction must be drawn between those two things. If this sub-letting was merely a breach of the contract, there was nothing to prevent the landlords from ignoring it and being prepared to continue with the tenancy. It was not unlawful under s. 15, sub-s. 3, of the Act of 1920, or within the meaning of para. (d) of sch. I to the Act of 1933, because that paragraph says "without the consent of the landlord." But it is conceded that it was unlawful also in that sense on March 1, though not subsequently.

[Somervell L.J. Is a sub-letting by a statutory tenant of the whole of the premises which is not contrary to the original contract unlawful?] No, for para. (d) merely has the effect of giving the landlord grounds for applying for possession. The fact that the Act makes a sub-letting by the statutory tenant of the whole of the premises *prima facie* a ground for possession whatever the provisions of the contract of tenancy does not make the sub-letting not lawful within the meaning of s. 15, sub-s. 3.

As for the question of waiver, acceptance of rent from the statutory tenant with knowledge of the breach shows that the landlord intends the statutory tenancy to continue. Here the landlords were entitled to rent up to the date when proceedings were instituted. Acceptance of rent after the breach of covenant, as in *Goodright v. Davids* (1), constitutes waiver of the breach. Where a breach of covenant takes place, and the landlord refuses to accept rent and brings proceedings for possession, it is only what is due from the tenant after the date when the proceedings are brought that is mesne profits, that is to say, damages: see *Elliott v. Boynton* (2).

There was evidence entitling the county court judge to say that, in view of the landlords' acceptance of rent and the delay (from March 1 to August 20) in bringing the proceedings, this was not a proper case in which to make an order for possession. The acceptance of rent with knowledge of the breach constituted a waiver on the common-law principle. There is sufficient similarity between a common-law and a statutory tenancy to make that principle applicable to the latter.

(1) (1778) 2 Cowp. 803.

(2) [1924] 1 Ch. 236.

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It is submitted that, whether the liability to pay rent continues until possession or the rent becomes mesne profits after issue of the writ, acceptance of "rent" by the landlord with knowledge of the breach constitutes waiver.

Safford K.C. replied.

Cur. adv. vult.

May 16. SOMERVELL L.J. read the judgment of the court which had been prepared by EVERSLED L.J. He referred to the facts, read s. 15, sub-s. 3, of the Act of 1920, and continued :] The point with which the county court judge dealt may be summarized as follows : Under the original lease to the statutory tenant there was a provision against sub-letting without the consent of the landlords and a right of re-entry if this covenant were broken. On March 1, when the statutory tenant sub-let to the defendant sub-tenant, no such consent had been obtained. The sub-tenant submitted that this fact could not be relied on, the absence of consent having been waived in circumstances to be set out more fully later.

Mr. Safford, for the landlords, took, as his first point, one which, in our view, is not dealt with in the judgment and which does not appear, we think, on the judge's note. Mr. Neligan, who appeared for the landlords before the county court judge, told us that he referred to the point, but we have come to the conclusion that it was not effectively taken within the familiar principles which have been laid down ; but Mr. Heathcote-Williams, who appeared for the sub-tenant, was anxious that the point should be dealt with if the court felt itself in a position to do so. Full argument was, therefore, heard on both sides.

In the circumstances, Mr. Safford conceded that, as regards the facts, the court must make, consistently with the findings of the county court judge and the evidence, all necessary assumptions most favourably to the sub-tenant. On this basis, the facts which the court must take as found or proved were that before March 1, 1946, the statutory tenant had sub-let all the premises, other than the part which became the subject-matter of the sub-letting to the sub-tenant, to a Mrs. Jacobson. The letting to Mrs. Jacobson was a furnished letting, and the circumstances were such as to raise clearly the inference that the statutory tenant intended and expected to re-occupy the premises herself and to negative the conclusion that she had abandoned the idea of making the house or any part thereof

her home. The sub-letting to the defendant sub-tenant was an unfurnished letting, and, from the evidence, it appeared that this letting also was intended to be of a temporary nature, namely, until the marriage of that sub-tenant, then thought to be imminent. On or about August 1, 1946, Mrs. Jacobson left the premises sub-let to her, and on August 20, 1946, the date when the present action was begun, those premises were vacant, save that the statutory tenant's furniture remained thereon. During the period from August 1 to 20, it must be assumed, rent was paid by the sub-tenant to the statutory tenant and accepted in the ordinary way.

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Counsel's argument for the landlords was that since, at the date of the so-called "sub-letting" to the sub-tenant, the tenant had already sub-let the remainder of the premises to Mrs. Jacobson, the sub-letting to the defendant sub-tenant, as a matter of law and notwithstanding the intention of either party to the contract, involved necessarily an abandonment by her of all possession or right to possession of the whole premises; so that, never having had any other interest, in the eye of the law, in the premises than the right of possession, she could, at the date of the sub-letting, confer upon the defendant sub-tenant no estate right or interest of any kind in the part which she purported to sub-let. The contract of March 1, 1946, was accordingly (so Mr. Safford says) a nullity ab initio, and, as such, incapable of being animated or enlarged by anything which occurred since the date of the contract.

Upon this part of the landlords' case there is, in our view, only one question with which we are concerned, namely, does the sub-tenant come within the ambit of s. 15, sub-s. 3, of the Act of 1920, as a sub-tenant to whom part of the premises have been lawfully sub-let? The answer to the question depends upon the proper interpretation of the sub-section, and particularly of the words "sub-tenant" and "sub-let," for, upon this part of the argument, it must be assumed that the contract of "sub-letting" did not involve any breach of the contractual terms imported by the statutes into the statutory tenancy; and, as regards para. (d) of sch. I to the Act of 1933 (to which further reference is made presently), though it is no doubt true that the absence of the landlords' consent at the time of the alleged sub-letting would then have given to the landlords the right to invoke the jurisdiction of the court, the terms of the paragraph cannot, in our judgment, be held to produce the result, for the purposes of this part of the landlords' argument, that

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any sub-letting of part of the premises, the remainder being already sub-let, made at the time without the landlords' consent, must be regarded altogether as a nullity.

In our judgment, it is neither necessary nor profitable to consider what right or interest in the property the statutory tenant created or was capable of creating by the "sub-tenancy" under discussion. The question, and the only question, is whether the sub-tenant, however spectral her interest in the property by virtue of this contract of sub-tenancy, can properly be described as a sub-tenant to whom the premises had been lawfully sub-let within the meaning—the somewhat artificial meaning—of s. 15, sub-s. 3, of the Act of 1920. It is to be noted that the sub-section makes in its terms no distinction between one kind of sub-letting and another.

It must now be taken as well settled by decisions of this court that the nature of the right or interest of a statutory tenant is that of a personal right of possession on the terms partly of the original contract of tenancy and partly derived from the statutes. The words "tenant," "sub-tenant," "tenancy," etc., are, therefore, used so as to comprehend such an interest involving no estate in the land recognized by the common law. The interest of the statutory tenant is not therefore capable of assignment, bequest or devolution to a trustee in bankruptcy: see, for example, the cases cited in argument of *Keeves v. Dean* (1), *Lovibond v. Vincent* (2), *Sutton v. Dorf* (3).

As a matter of principle and logic, it would appear at first sight necessarily to follow that a sub-tenancy, whether of the whole or of any part of the premises in question, granted by a statutory tenant must equally fail to confer upon the grantee any such estate in the property. It is, however, plain from the terms of s. 15, sub-s. 3, of the Act of 1920, that persons to whom a statutory tenant has purported to grant a sub-tenancy may thereby acquire at least a personal right to continue in possession, good against the landlord, after the statutory tenancy has come to an end.

The effect of sub-lettings by a statutory tenant of parts of a dwelling-house within the scope of the Rent Restriction Acts had to be considered by this court in the two cases of *Roe v. Russell* (4) and *Haskins v. Lewis* (5), but in neither of these cases was it necessary for the court to decide upon the validity

(1) [1924] 1 K. B. 685.

(4) [1928] 2 K. B. 117.

(2) [1929] 1 K. B. 687.

(5) [1931] 2 K. B. 1.

(3) [1932] 2 K. B. 304.

of a sub-letting, *uno flatu*, of the whole premises, or of part of the premises, the remainder having already been sub-let. In these cases, and particularly in the former, the court had to consider, in the light of the earlier decisions relating to assignment and devolution, whether as a matter of principle a sub-letting of part of the premises by a statutory tenant could have any force or validity. In *Roe v. Russell* (1), the Divisional Court had been faithful to logic and decided adversely to the sub-tenant. The Court of Appeal, reversing the Divisional Court, resolved the difficulty by concluding that a statutory tenant who had sub-let only part of the premises had not, *quoad* the premises as a whole, so renounced his personal right of irremovability as to disqualify him from retaining any interest in the premises and so from effectually conferring on his sub-tenant a valid right. It must, therefore be taken as established by decision of this court that a sub-letting by a statutory tenant of part of his premises will be effectual to confer upon the sub-tenant the rights specified in s. 15, sub-s. 3, of the Act of 1920, if, at whatever be the material date or dates, the statutory tenant retained a sufficient possession of or interest in the remainder of the premises to preserve his own rights as statutory tenant.

Applying this principle to the facts of this case, we are of opinion that the landlords must fail. For in our judgment, the material date on which to determine whether the principle applies is that of the issue of proceedings. On that date in the present case, namely, August 20, 1946, Mrs. Jacobson, the sub-tenant of the part of the premises first sub-let, had gone out of possession. The remainder of the premises were not, therefore, on August 20, in fact, sub-let. These premises were, as we have stated, then vacant, but the statutory tenant's furniture was in them, and on the evidence it seems reasonably clear that the statutory tenant had at no time abandoned the premises as her home.

Norman v. Simpson (2) decided that, in determining whether a tenant (in that case a contractual tenant) had "lawfully sub-let" premises for the purposes of s. 15, sub-s. 3, of the Act of 1920, it was sufficient, though the sub-letting had been originally "unlawful" in the sense that it had involved a breach of the tenant's obligations under the tenancy, that that breach had been waived and the "unlawfulness" thereby remedied at the date of the determination of the tenancy. From this case and

(1) [1928] 2 K. B. 117.

(2) [1946] K. B. 158.

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others which have since followed it, the principle must now, in our judgment, be taken as established that, in a case arising under s. 15, sub-s. 3, of the Act of 1920, the relevant facts must be determined at the date of the institution of proceedings. We do not accept the view that the sub-tenancy to the defendant sub-tenant, if ineffectual in law on March 1, 1946, was thereafter incapable of being rendered effective. The contract, which was one of weekly tenancy, continued inter partes, and was given effect to in fact by the possession thereunder of the sub-tenant. If, at the date when it was originally made, it was legally ineffective to confer upon the sub-tenant any right under the Acts, we can see no reason why thereafter, when the statutory tenant had regained actual possession of the remainder of the premises, it should not have become and remained effective so long as those conditions existed.

In our view, therefore, the sub-tenant was, on August 20, 1946, a person falling within the definition of a sub-tenant to whom the premises had been sub-let, and (for the purposes of this part of the landlords' argument) it must be assumed lawfully sub-let within s. 15, sub-s. 3, of the Act of 1920. It becomes, accordingly, unnecessary for us to express any opinion on the questions : what was the effect of the sub-letting on its date, March 1, 1946 ? ; what would have been the position had Mrs. Jacobson remained in occupation of the part of the premises sub-let to her on August 20, 1946 ? ; or on the more general question, left undecided by *Roe v. Russell* (1) and *Haskins v. Lewis* (2), whether a sub-letting by a statutory tenant, either of the whole premises or of part of the premises, the remainder being already sub-let, in each case in circumstances from which it could be inferred that there had been an abandonment by the statutory tenant of the whole premises or any part thereof as his home, would or could be effective to confer upon the sub-tenant any right under s. 15, sub-s. 3. On these matters we reserve our judgment. Should the last of them come before the courts and fall at any time to be considered by the highest tribunal; the House may consider whether the grounds stated by this court in *Roe v. Russell* (1) were necessary for its decision : whether, in other words, having regard to the characteristics of a statutory tenancy, the tenant's inability to pass to a third party by assignment or otherwise any right or interest in the property recognized by the law is a material or necessary consideration in determining whether a

(1) [1928] 2 K. B. 117.

(2) [1931] 2 K. B. 1.

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third party who is in actual occupation under a contract of "sub-tenancy" can claim the benefit of s. 15, sub-s. 3, of the Act of 1920. And, in the circumstances, it is also unnecessary for us to express any view on the argument, much relied upon by Mr. Safford, based on para. (d) of sch. I to the Act of 1933, which entitles a landlord to invoke the jurisdiction of the court if "the tenant without the consent of the landlord has
 "assigned or sub-let the whole of the dwelling-house or sub-
 "let part of the dwelling-house, the remainder being already
 "sub-let." It is true that sub-lettings of the kind specified are treated, for the purposes of the paragraph, as being in *pari materia* with an assignment. On the other hand—particularly having regard to the reference to the landlord's consent—we are by no means satisfied, having regard to the express provisions of s. 15, sub-s. 3, of the Act of 1920, that the language of the paragraph should be treated as supporting the view that such a "sub-letting" can have no more force and effect for any purpose than an "assignment." As we have already stated, at the material date in the present case the remainder of the premises were not, in fact, sub-let, and had not been for more than two weeks. In our judgment, therefore, the landlords are not entitled to succeed on the first part of their argument, assuming it to be open to them.

It therefore becomes necessary to consider their second point, which was argued before the county court judge and decided by him adversely to the landlords. It is common ground that the grant of the sub-tenancy to the defendant sub-tenant was in breach of the contractual terms imported into the statutory tenancy, as it was also without the landlords' consent within para. (d) of sch. I to the Act of 1933. The county court judge held, however, that the acceptance by the landlords of two instalments of rent from his statutory tenant after they had full knowledge of the sub-letting waived the absence of consent—applying in this respect to the case of a statutory tenancy the well established principles as to waiver appropriate to a common-law lease.

The argument of the landlords is that this analogy is false. In the case of a common-law lease the doctrine of waiver by acceptance of rent after knowledge of breach of covenant (other than a continuing breach) proceeds, as he argues, from the premise that acceptance of rent in such circumstances is consistent, and consistent only, with an affirmation of the tenancy; whereas, in the case of a statutory tenancy, since

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that tenancy continues by virtue of the statute until the tenant dies or delivers up possession either voluntarily or under an order of the court, and since the obligation to pay rent continues as an incident of the tenancy until its determination, receipt of rent after notice of an act by the statutory tenant which entitles the landlord to invoke the jurisdiction of the court to order possession is equivocal at best and cannot, therefore, operate per se as a waiver of the landlord's right to assert the "unlawfulness" of the sub-letting. There is, we think, force in this argument. By the common law, which tended to construe forfeiture provisions as effective to render leases voidable and not void, a landlord was bound, as soon as he was fully aware of a non-continuing breach of covenant by the tenant entitling the landlord to avoid the lease, to elect at once for or against avoidance, and to notify the tenant if he made the former election. On this principle acceptance of any rent accrued due after the landlord's knowledge of the tenant's breach was regarded necessarily as inconsistent with an election to avoid the lease and consistent only with its affirmance. The acceptance of the rent being, in the circumstances, an unequivocal act, waiver of the breach followed, according to Parker J. in *Matthews v. Smallwood* (1), as a matter of law; and so unequivocal was the act of acceptance of rent that the landlord was held disentitled to get the best of both worlds by attempts to qualify his acceptance, for example, by stating that he accepted the rent without prejudice to his rights of forfeiture; see the notes in Smith's Leading Cases to *Dumfries's* case (2), 13th ed., vol. I., pp. 34 et seq. Nor do we think that these principles have been in any way qualified by the decision of this court in *Elliott v. Boynton* (3), relied on by the sub-tenant. That case only decided that the obligation to pay rent under a contractual tenancy continues until the tenancy is determined in fact by re-entry, namely, the issue of the writ for possession.

It must, in our judgment, be conceded that the principles of the common law above stated cannot apply or cannot wholly apply to a statutory tenancy. In the first place, the landlord of a statutory tenant has no right to avoid the tenancy: his only right is to invoke the jurisdiction of the court to make an order for possession, and the tenancy continues until at least the date of the order. Secondly—and consequentially—

(1) [1910] 1 Ch. 786-7.

(3) [1924] 1 Ch. 236.

(2) [1603] 4 Co. Rep. 119b.

the obligation of the tenant to pay rent and the right of the landlord to accept it continues notwithstanding the breach of covenant and notwithstanding the landlord's election to invoke the court's jurisdiction, and the issue by him of his summons pursuant to his election.

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In our judgment, therefore, it may fairly be said that the acceptance of rent by a landlord after knowledge of a non-continuing breach of covenant by a tenant entitling the landlord to go to the court is not so unequivocal an act of affirmance of the tenancy as is acceptance of rent in like circumstances from a contractual tenant. On the other hand, it is, we think, important to bear in mind, that, under the scheme of the Rent Restriction Acts, the incidents of tenancy as understood by our law continue to apply to a statutory tenancy so far as they are consistent with the provisions of the Acts. From long usage the acceptance of rent by a landlord after knowledge of circumstances giving rise to a claim for possession has come to be regarded by landlords and tenants alike as evidence of an intention to affirm the tenancy. Moreover, the landlord has, in the case of a statutory tenancy, a choice—he may either rely on the breach and go to the courts, or he may waive it—though his choice is not the same as that presented to the common-law landlord. Finally, (and to this extent *Elliott v. Boynton* (1) in our view, assists the sub-tenant), the continuance of the obligation to pay rent under a contractual tenancy accruing after the breach for some period is not itself inconsistent with the landlord's election to forfeit.

If, therefore, it is not justifiable to treat the common-law rule as entirely applicable to a statutory tenancy (as the county court judge implied), we think that the question whether, in any case, the acceptance of rent by the landlord is an unequivocal act of affirmance of the tenancy is a question of fact for the judge to determine in the circumstances of the case, and if he decides that question of fact affirmatively, then the ordinary legal consequences would, *prima facie*, follow. Thus, we are strongly inclined to think that the strict common-law rule in regard to a qualified acceptance of rent is not applicable to a statutory tenancy, and that a qualified acceptance of rent from a statutory tenant is not necessarily fatal to the landlord's rights to seek an order for possession. As at present advised, we think that the fair rule is that a landlord who has acquired full knowledge of a non-continuing breach of covenant by a

(1) [1924] 1 Ch. 236.

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statutory tenant entitling him to invoke the court's jurisdiction should be entitled thereafter to receive rent and should not, by reason of such receipt, be held to have waived the breach, provided that he makes it clear to the tenant at the time of, or before, the receipt that his receipt is without prejudice to his right to go to the court, and provided that he issues his summons for possession within such time as, having regard to all the circumstances of the case, the court hearing the summons regards as reasonable.

In the present case, the facts as regards waiver do not appear to have been very closely examined. It is, however, clear from the evidence that the tenant assumed from the acceptance of her rent after the fact of her sub-letting was known that her position had been secured. She, accordingly, took no step, as she might have done, to try to remedy her position. It is also clear from the evidence that the landlords' agents assumed that acceptance of rent after knowledge of the sub-letting would be fatal to any claim founded on the sub-letting, and gave instructions accordingly to the collector of the rent—instructions which were, unfortunately for the landlords, disregarded on two occasions. In the circumstances, therefore, and bearing in mind the general background to which we have alluded, we come to the conclusion that, as a question of fact, the acts of the landlords amounted, and were understood by the tenant to amount, to such an unequivocal affirmance of the sub-tenancy that they must be taken to have waived their statutory rights and condoned the absence of consent.

For these reasons we think that the landlords' second point also fails, and that the appeal must be dismissed, with costs.

Appeal dismissed.

Solicitor for the landlords: *Leslie A. Fawke.*

Solicitors for the sub-tenant: *Woolley, Tyler & Bury.*

Applied. DONOVAN v. CAMMELL
LAIRD & Co. [1949] 2 All E.R. 82.

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Mar. 25, 26,
27, 28, 31;

Apr. 1, 2.

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Shipping—Shipbuilding—Public dry dock—Several repairers at work on ship—One whose work necessitated the entry into dry dock—Not notional occupier—Concealed danger—Workman invitee falls through unlighted access hatch—Occupier at place of injury—Shipbuilding Regulations, 1931 (St. R. & O. 1931, No. 133)—“Duties”—Factories Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 67), s. 60, sub-s. 1 s. 159, sub-s. 1.

Common law liability—Invitor and invitee—Invitor with no exclusive occupation of place where injury occurred.

By the Shipbuilding Regulations, 1931, under the heading “Duties,” it is provided that: “It shall be the duty of the “occupier to comply with Parts I to VIII of these Regulations; “Provided that, when a ship is being repaired in *public dry dock*, “the person who contracts with the owner of the ship or with his “agent to execute the work of repair, shall be deemed to be the “occupier for the purposes of Parts I to VIII. . . .”

Where there are several repairers on a ship in a public dry dock and one of them has hired the dry dock, since his work of repair could only be done in a public dry dock, he is not the notional occupier of the public dry dock within the meaning of the regulation. So held by Lord Oaksey L.J. and Roxburgh J.

Per Lord Oaksey L.J. :—The regulation does not render one of several repairers on the ship the notional occupier of the dry dock within the meaning of the regulation; nor does it make any difference that the repairer in question is doing repairs which can only be done in a dry dock or that he hired the public dry dock. The words in the regulation, “when a ship is being repaired” relate to time, and the words, “the work of repair” relate to the work of repair which is, in fact, being carried out in the dry dock.

A cargo ship was being converted into a troopship under a contract between the Ministry of War Transport and repairers, defendants A., which extended to almost every part of the ship. Repairers, defendants B., had contracted with the shipowners to do certain electrical repairs in the ship and certain external repairs to the propeller, which necessitated the entry of the ship into a public dry dock, which was hired by them. Whilst in the dry dock, on the day and at the time of the injury, joiners employed by defendants A. were working on the No. 2 lower ‘tween deck with clusters of lights provided by them and they were the only repairers working on that deck at that time. The shipowners, defendants C. provided current on the ship but no lights on the No. 2 lower ‘tween deck or the hold, the clusters provided and used by defendants A., being the only artificial light on the lower ‘tween deck. At noon, defendants D. employed by the Ministry of War Transport to load and trim the ballast had finished their work and insisted on its being inspected and passed by

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defendants A. The marine-superintendent, the chief shore officer of the shipowners, defendants C., and the foreman shipwright of defendants A., went into the hold by an access hatch on No. 2. lower 'tween deck and after inspecting the trimming returned through that hatch. After dinner, the plaintiff employed by sub-contractors to defendants A., was ordered to lower timber from No. 2 lower 'tween deck into the hold, where it was to be fitted over the ballast. He fell down the access hatch already mentioned which was then uncovered, unprotected and unlighted, into the hold and was injured. It was contended by the plaintiff that defendants A. were liable at common law, defendants B. as being notional occupiers of the ship under the Shipping Regulations, 1931, and that defendants C., the shipowners, were liable under the regulations on the ground that it was their duty to supply the lighting and that they were bound to afford protection at the hatch, and also at common law :—

Held, that the defendants, repairers A., were liable at common law on the rule laid down in *Indermaur v. Dames* (1866-7) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

Per Lord Oaksey L.J. :—By the rule in *Indermaur v. Dames* the invitor need not have exclusive occupation of the premises to which the invitee comes and where he is injured. The true view is that when a person invites another to a place where they both have business, the invitation creates a duty on the part of the invitor to take reasonable care that the place does not contain, or to give warning of, hidden dangers of which he knows or ought to know :—

Observations of Lord Wright in *Glasgow Corporation v. Muir and Others* [1943] A. C. at p. 462, followed.

Held also that none of the other defendants were liable. Defendants B., were not liable (*per* Lord Oaksey L.J. and Roxburgh J.) on the ground alleged that they were the notional occupiers of the public dry dock; defendants C., were not liable either under the regulations or at common law. They were not the occupiers, nor were they in control of the No. 2 lower 'tween deck. If exceptions *b* and *c* to the proviso under the heading "Duties" of the regulations were applicable, the shipowners were not in breach of them.

APPEAL from a judgment delivered by Stable J. at Liverpool Assizes.

The s.s. *Mataroa*, a large refrigerating cargo ship, had been converted into a troopship in August, 1942, had come back from South Africa carrying a cargo, and was being reconverted into a troopship. For this purpose, the Ministry of War Transport had entered into an oral contract with the first defendants, Grayson Rollo and Clover Docks, Ltd., to fit the equipment necessary to contain the sand ballast which had to be shipped in her hold and to fit the necessary floors, and

generally to reconvert the ship, as a troopship. The work actually carried out by the first defendants appeared to extend to almost every part of the ship. The plaintiff was employed by Messrs. Porter, a firm of sub-contractors to the first defendants. The fourth defendants, William Cooper & Sons, Ltd., were employed by the Minister of War Transport to load the ballast. The second defendants, A. and R. Brown, Ltd., had contracted with the shipowners, Shaw Savill and Albion Co., Ltd., to do certain electrical repairs to the ship and certain external repairs to the propeller. The third defendants were the shipowners. The Mersey Insulation Co. was also doing repairs on the ship; but this company was not a party to the action.

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On August 9, 1942, the ship had been taken into a public dry dock belonging to the Mersey Docks and Harbour Board, the hiring of the dock being effected by the second defendants, A. and R. Brown, Ltd., since the repairs which necessitated the ship being taken into public dry dock were to be carried out by the second defendants under contract with the shipowners. During the morning of that day, the loading and trimming of the ballast had been completed. On No. 2 lower 'tween deck, immediately above the hold, some joiners employed by the first defendants were working, with clusters of lights provided by them and the first defendants were preparing to lay a wooden floor over the sand ballast and fit other equipment in the hold. The main hatch was partly uncovered from top to bottom. Access to the two 'tween decks and to the hold was by access hatches and perpendicular access ladders, the access hatches not being immediately above each other, so that anyone coming down the ladder from the upper 'tween deck, on to the lower 'tween deck, when he stepped off the ladder had to move two feet three inches to one side to the access hatch leading down to the hold. There was no artificial light except the clusters used by the joiners, and the learned judge found, and there was no challenge to his finding, that, at the time of the accident, the light was so inadequate as to make the open access hatch in the lower 'tween deck a trap or concealed danger. The shipowners were supplying the current for the lighting and some of the lights on the ship, though none in the 'tween decks or the hold.

At noon on August 9, 1942, the fourth defendants, then having finished the loading and trimming of the ballast, insisted on its being inspected and passed by the first defen-

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dants, and the marine superintendent, the chief shore officer of the shipowners and the foreman shipwright of the first defendants in fact went to the hold by way of the access hatch, and inspected the trimming. After dinner, the plaintiff was ordered to go below and lower some pieces of timber from the lower 'tween deck to the hold, where it was to be fitted by the first defendants over the ballast. When he got on to the lower 'tween deck he took two steps from the bottom of the ladder and fell down the open access hatch.

Stable J. held that the access hatch was a concealed danger, but that none of the defendants were responsible, since, by virtue of the Shipbuilding Regulations, 1931 (1), the occupiers were liable and the occupiers were, in his view, the Mersey Docks and Harbour Board, following *Smith v. Cammell*,

(1) The Shipbuilding Regulations, 1931, were made by the Secretary of State under s. 79 of the Factory and Workshop Act, 1901, and continued under s. 159, sub-s. 1, of the Factories Act, 1937, and thereby given statutory force as if they had been made under s. 60 of that Act. The regulations were stated by their title to be made in respect of the construction and repair of ships in shipbuilding yards. "Shipbuilding yards" are defined in the Factory and Workshop Act, 1901, sch. VI, Part II, para. 25, as: "Any premises in which any ships, boats or vessels used in navigation are made, finished or repaired."

The passage in the Shipbuilding Regulations, 1931, under the heading "Duties," reads as follows: "It shall be the duty of the occupier to comply with Parts I to VIII. of these Regulations. Provided that, when a ship is being repaired in *public dry dock*, the person who contracts with the owner of the ship or with his agent to execute the work or repair, shall be deemed to be the occupier for the purposes of Parts I to VIII, and it shall be his duty to comply with the said

"parts, except as follows:—(a) It shall be the duty of the person having the general management or control of the *public dry dock* to comply with Regulations 2 (b) and (c) and 11 (c) so far as they concern those gangways, uprights, thwarts and planks provided at the dock by such person; with Regulation 42 (b) so far as it concerns the lighting of the quay round the dock; and with Regulation 46. (b) Where the control of the ship apart from the work of repair remains with the shipowner, it shall be the duty of the shipowner, master or officer in charge, to provide the protection specified in Regulation 10 in so far as concerns those hatches or openings which are not required to be used for the purposes of the repairs, but if such protection be removed by any person or persons in the employment of the occupier or at his or their request, the occupier shall be responsible for its replacement as soon as practicable. (c) Where the shipowner provides the lighting on board the ship it shall be the duty of the shipowner, master or officer in charge, to comply with Regula-

Laird & Co., Ltd. (1). He held that there was no liability at common law on any of the defendants. He did not find (and there was no question before the Court of Appeal of) contributory negligence, and he assessed the damages, in the case of a successful appeal, at 2,058*l*.

The plaintiff appealed, but as regards the fourth defendants, William Cooper and Sons, Ltd., only on the issue of costs.

Wooll K.C. and *J. R. Crighton* for plaintiff. It is submitted that Stable J. (1.) misconstrued the allocation of duties, as set out in the preamble to the Shipbuilding Regulations, 1931, under the heading: "Duties"; (2.) misconstrued the obligations as to lighting of the ship under the regulations, and (3.) gave inadequate, if any, consideration to the question of the common law liability, alleged against the first and third defendants, Grayson Rollo and Clover Docks, Ltd., and the ship-owners, Shaw Savill and Albion Co., Ltd. By the preamble to the regulations it is the duty of the occupier to comply with parts I to VIII of the regulations, provided that when a ship is being repaired, as was the *Mataroa*, in public dry dock, there is a notional occupier who is liable, with the exceptions there stated. It is the occupier of the shipbuilding yard who is first referred to. See the observations of Lord Atkin in *Smith v. Cammell, Laird & Co., Ltd.* (2). Here, therefore, we are concerned with the occupier of the public dry dock, i.e.,

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"tion 42 (b) so far as regards the
"lighting on the ship which he has
"undertaken to provide.

"It shall be the duty of all
"persons employed to comply
"with Part IX of these Regula-
"tions."

Regulation 1, which deals with
means of access, reads as follows:
"Safe means of access shall be
"provided to all parts of the ship
"to which persons employed may
"be required to proceed in the
"course of their employment."

By reg. 10: "All openings in
"decks and tank tops shall be
"securely protected. Such pro-
"tection shall be maintained in
"position and when necessarily
"removed in the course of work
"shall be replaced as soon as
"practicable. In particular—

"(a) when the protection consists
"of fencing, the fencing shall be
"at least three feet high; (b) when
"the protection consists of a cover,
"the cover shall be so constructed
"as securely to cover the
"opening."

By reg. 42: "(a) All parts of a
"ship where work is being carried
"on shall be efficiently lighted.
"(b) All approaches to such parts
"and to places to which a person
"employed may be required to
"proceed in the course of his
"employment shall be adequately
"lighted, and, in particular, lights
"shall be provided at all deck and
"other dangerous openings and at
"all ladders and gangways . . ."

(1) [1940] A. C. 242.

(2) Ibid.

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any dry dock which is available for hire. The notional occupier is "the person who contracts with the owner of the ship or "with his agent to execute the work of repair." Accordingly, the first defendants who were doing repairs to the ship are relieved of liability under these regulations, since their contract for the repair of the ship was not with the shipowners, but with the Minister of War Transport. There were two companies who were doing repairs on the ship under contract with the shipowners: the second defendants, A. and R. Brown, Ltd. and the Mersey Insulation Co. The second defendants were sued as the notional occupiers of the dry dock, since their work it was, which necessitated the vessel being taken into dry dock, and it was these defendants who had hired the public dry dock, which belonged to the Mersey Docks and Harbour Board, Stable J. held that the Harbour Board were the occupiers, but it is clear that they were never the notional occupiers, who were made liable under the regulations. The plaintiff put forward no claim under the express provisions of the Factories Act, 1937, where the remedy given is against the actual occupier of a factory, unless the owner or a person under s. 130, sub-s. 2, of that Act is expressly made liable. The emphasis in the words of this regulation lies on the words, "to execute the "work of repair," that is the work of repair which takes the ship into a public dry dock. Since, by the Interpretation Act, 1889, the singular includes the plural, it might here be that the notional occupier may be any person who, under a contract with the shipowners, is executing a work of repair at the site of the accident. The view of Luxmoore L.J. in *Wilkinson v. Rea, Ltd. and Others* (1), appears to have been that where repairers only agreed to do certain parts of the repair work carried out on a ship, whilst in dry dock, they are not the notional occupiers of the dry dock. But, on this view, it may be that each repairer is in occupation of that part of the dry dock where he is carrying on his repairs.

The material exceptions to the liability of the notional occupier are those marked b and c to the proviso in the preamble. Under exception b where the control of the ship, apart from the work of repair, remains with the shipowner, it is his duty to provide the protection for the openings on decks under reg. 10, which are not required to be used for the purposes of the repairs, "but if such protection be removed by "any person or persons in the employment of the occupier

(1) [1941] 1 K. B. 688, 700.

" . . . the occupier shall be responsible for its replacement as soon as practicable." Under exception b. therefore, either the shipowners or the notional occupiers were responsible. The duties are absolute. See *Smith v. Cammell, Laird & Co. Ltd.* (1) and *Wilkinson v. Rea, Ltd. and Others* (2). Under exception c where the shipowner provides the lighting on board the ship, it is his duty "to comply with reg. 42 (b) so far as regards the lighting on the ship which he has undertaken to provide." Regulation 42 (b) deals with the lighting of approaches to places of work. The notional occupier of the ship is liable under reg. 42 (a) for the lighting of the ship; but where the shipowner provides the lighting on board, he is liable for the lighting he has undertaken to provide.

The first defendants and the third defendants, the shipowners, are liable at common law, not only on the principle laid down in *Indermaur v. Dames* (3) but on wider grounds. See the observations of Lord Wright in *Glasgow Corporation v. Muir and Others* (4). There was no claim against the second defendants at common law. Stable J. found that the unlighted access hatch was a concealed danger. The Shipping Regulations, 1931, by reg. 1, with regard to providing safe means of access, by reg. 10 with regard to the protection of openings in decks, and by reg. 42 (a) and (b) with regard to the lighting of the ship, imposed not maximum but minimum obligations. The measure of duty for the reasonable man should be at a higher level and he should seek to provide at least against all that the regulations were intended to cover. The representatives of the first and third defendants, when they came up from the hold just after noon on August 9, 1942, after inspecting the trimming of the ballast, should have replaced the cover on the access hatch to guard the safety of those who would next be going down into the hold. This trap was more dangerous than that of a cellar flap in the street (see *Daniel v. Rickett, Cockerell & Co., Ltd. and Raymond* (5)), since this access hatch was unlighted. The first and third defendants must be liable at common law; it was the duty of one or other of them or of both to foresee that if this hatch were left uncovered, unprotected and unlighted and no warning were given of its existence, there would be danger to persons lawfully using it.

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(1) [1940] A. C. 242.

(4) [1943] A. C. 448, 462-3.

(2) [1941] K. B. 688, 700.

(5) [1938] 2 K. B. 322.

(3) (1866-7) L. R. 1 C. P. 274;

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[LORD OAKSEY. But why were the first defendants responsible ?] Because they had taken over the hold and the access thereto from the trimmers : they were in control of No. 2 lower 'tween deck. If the control of the ship remained with the ship-owners they were responsible. It was their ship and they were in actual occupation of it.

The first defendants here are liable at common law ; the second as the notional occupiers of the ship or that part of the ship where the injury occurred under the Shipping Regulations, 1931, and the third defendants, the shipowners, both at common law and also under the regulations. The three defendants were under concurrent duties to the plaintiff. *Daniel v. Rickett, Cockerell & Co., Ltd. and Raymond* (1) shows that there may be liability on more than one person. [*Lovell v. Blundells and T. Albert Crompton & Co., Ltd.* (2) and *Prenton v. General Steam Navigation Co., Ltd.* (3) were also mentioned.]

Nelson K.C. and *Glyn Burrell* for the first defendants, Grayson Rollo and Clover Docks, Ltd. These defendants are said to be liable at common law, as the inviters of the plaintiff, who was employed by a firm of their sub-contractors, but the servant of a sub-contractor is not, of necessity, an invitee of his head contractor since an invitee must always be the invitee of an occupier. See *Salmond on the Law of Torts* (10th ed.), at pp. 476-481. But these defendants were not under a duty to the plaintiff since they were never in occupation of the ship or any part of it : *Glasgow Corporation v. Muir and Others* (4). Nor did they, in fact, supply light to the ship, but only the clusters of lights used by their own men which were supplied with current by the shipowners. These defendants were carrying out their work of repair on parts of the ship, but they were not in occupation of the ship nor in control of it ; they were never in a position to exclude anyone from the ship and there was no evidence that they were in occupation or control of this access hatch, though some of the defendants' joiners were working on the 'tween deck. The right to invite the plaintiff to come on to the ship or to any part of it could only arise from the legal occupation of the ship. There was no evidence that these defendants had removed the hatch cover and there was no obligation on these defendants to light the hatch way. The basis of the duty of an occupier is that he has control of the premises by occupation. The shipowners were

(1) [1938] 2 K. B. 322.

(3) (1944) 77 Ll. L. Rep. 174.

(2) [1944] 1 K. B. 502.

(4) [1943] A. C. 448, 461.

in occupation and control of this ship, and being its owners, invited the various contractors to the ship and they supplied the current for lighting. The shipowners were responsible, if the premises contained a concealed danger which was a trap. [Roxburgh J. Can you say that the statement of law on this subject in par. 129 at p. 476 of Salmond on the Law of Torts is complete?] Yes. There is no case in which it has been held that, at common law, the mere fact that a contractor goes on board a ship to carry out repairs establishes that he is in occupation of the ship or of any portion of it. [Bucknill L.J. Why is this burden put on the occupier?] Because he is the person who has control of the premises: *Canter v. J. Gardner & Co., Ltd.* (1). [Lord Oaksey. It may be that something less than what is called occupation may create a duty on your clients to those whom they in fact invite to come on to the ship.] The liability here is for dangerous premises which were unlighted and that liability is, apart from special circumstances, one which lies only on the occupier. The sole question here, therefore, was: Who was the occupier? The first defendants were not the occupiers of this ship or of any part of it and cannot be said to be the inviters of the plaintiff. Furthermore, the first defendants did not by any positive act create a trap, either by the omission to put back the cover over the access hatch, or by a failure to light it. See the judgment of Bankes L.J., in *Kimber v. Gas Light and Coke Co.* (2). [*Smith v. Cammell, Laird & Co., Ltd.* (3) was again referred to.]

Pritchard K.C. and *J. S. Watson* for the second defendants, *A. and R. Brown, Ltd.* No case is alleged against these defendants at common law. Their liability is alleged to have arisen only from the Shipping Regulations, 1931. Under the words of the preamble to the regulations with its proviso and exceptions, when a ship is being repaired in public dry dock and an accident occurs thereon, there are three possible persons who may be liable: (1.) the notional occupier, if there is one; (2.) the person having the general management or control of the public dry dock, in this case the Mersey Docks and Harbour Board, under exception a with regard to the matters there stated; and (3.) the shipowners under exceptions b and c with regard to the matters therein stated. There was here no notional occupier of the ship or dry dock. The words of the regulation are: "the person who contracts with the owner of

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(1) [1940] 1 All E. R. 325.

(3) [1940] A. C. 242.

(2) [1918] 1 K. B. 439, 445.

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"the ship or with his agent to execute the work of repair." The important words are "the work of repair"; the words are not "some of the works of repair" or "that part of the" "work of repair which made necessary the use of the dry dock." The words in the regulation mean the "whole of the work of" "repair" without any limitation. The second defendants did not contract with the shipowners to do "the work of repair" but only to do some of it and the decision of Stable J. was right in holding that, in the circumstances, the second defendants were not liable as notional occupiers. In *Wilkinson v. Rea, Ltd. and Others* (1) Stable J. said that when a ship was under repair in a public dry dock the person who contracted with the owner of the ship to execute work of repair was to be deemed to be the occupier, but that proviso had no application when there were a number of contractors for doing various jobs on a ship. It contemplated the case when the ship was handed over in a dry dock and passed virtually and substantially into the control of the contractor who took her over. A. and R. Brown, Ltd., therefore, were not the "occupiers." And Luxmoore L.J. (2) approved this reasoning.

It is clear, then, that there is only a notional occupier if he contracts with the shipowner to do the whole of the repair work on the ship in the public dry dock and, even when there is a notional occupier, as appears from exception b the shipowner where the control of the ship, apart from the work of repair, remains with him, is liable to provide the protection specified in reg. 10 with regard to openings in decks, in so far as concerns these hatches or openings which are not required to be used for the purposes of the repairs.

S. Scholefield Allen K.C. and *Nicklin* for the third defendants, the shipowners. The plaintiff alleges that the shipowners are liable, both under the Shipbuilding Regulations, 1931 and at common law. They are not liable under the regulations. The argument advanced for the second defendants is now repeated. There was no notional occupier of this dry dock, since the second defendants only contracted with my clients to do some of the work of repair. If there is "no person who contracts with the" "owner of the ship . . . to execute the work of repair," the proviso does not come into operation, and, therefore, neither do the exceptions a, b or c to the proviso. The liability remains, therefore, with the occupier of the public dry dock, that is, the Mersey Dock and Harbour Board, as was decided by

(1) [1941] 1 K. B. 688, 691.

(2) *Ibid.* 700.

Stable J. *Smith v. Cammell, Laird & Co., Ltd.* (1). Further, even if where there is no notional occupier, it should be considered that exceptions b and c come into force, the shipowners were not in breach of them. Exception b provides that where the control of the ship, apart from the work of repair, remains with the shipowner, it is the duty of the shipowner to provide the prescribed protection for hatches "which" "are not required to be used for the purposes of the repairs," but "the purposes of the repairs" include all repairs carried out in the public dry dock and this access hatch was required for these. So also, the shipowners were not in breach of exception c since they had not undertaken to light No. 2 'tween deck.

With regard to the position at common law, Stable J. was right in deciding that the shipowners were not in control of the vessel. It is not necessary for the shipowners to uphold that position; it is sufficient for them to establish that they were not in control of either the hold or of the No. 2 lower 'tween deck, where was this unlighted and uncovered access hatch. In fact, there were some officers at the time with stewards to look after them; but there was no crew, on board. [*Garcia v. Harland and Wolff, Ltd.* (2) was referred to.]

Selwyn Lloyd for the fourth defendants, William Cooper & Sons, Ltd.

Wooll K.C. replied.

LORD OAKSEY L.J. This case raises important questions both on the construction of the Shipbuilding Regulations, 1931, and on the common law liability of some of the defendants. [His Lordship then stated the facts, and continued :] Before us, it was contended on behalf of the plaintiff that the first defendants, Grayson Rollo and Clover Docks, Ltd., were liable at common law, that the second defendants, A. and R. Brown, Ltd., were liable as the notional occupiers of the shipbuilding yard within the meaning of the regulations, that the third defendants, the shipowners, Shaw Savill & Albion Co., Ltd., were liable both under the regulations, on the ground that they had undertaken to supply the lighting and were bound to afford protection at the hatches, and at common law as shipowners, and that the fourth defendants, William Cooper & Sons, Ltd., though not liable, should not have been awarded their costs.

The first question which I will discuss is whether the second defendants were notional occupiers under the regulations. It is

(1) [1940] A. C. 242, 256.

(2) [1943] K. B. 731.

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true that the repairs which necessitated the ship being taken into the public dry dock were to be carried out by the second defendants under contract with the shipowners, but it is argued that although other substantial repairs were being carried out by the first defendants, who had no contract with the shipowners, and other repairs by the Mersey Insulation Co., the ship was "being repaired in public dry dock" and the second defendants had contracted "to execute the work of repair" within the meaning of the regulations. In my opinion it is not possible to read the regulations as making one of several repairers the notional occupier of the dry dock within the regulations; nor does it make any difference that the repairer in question is doing repairs which can only be done in a public dry dock or that he hired the public dry dock. The words in the proviso under the heading of "Duties" "when a ship is "being repaired" relate to time, and the words "the work of "repair" relate to the repair which is, in fact, being carried out in the dry dock. The only authority expressly in point is *Wilkinson v. Rea, Ltd. and Others* (1). Stable J. adopted the view I have expressed. Luxmoore L.J., with whom MacKinnon, L.J. agreed appears to have taken the same view. He said (2): "In the present case A. and R. Brown, Ltd., "had not agreed with the owners to repair the motor vessel "Linnell, in the Bidston dry dock. They had only agreed to "do certain parts of the repair work which was being carried "out on the ship while in that dock. It is, therefore, impossible "in my judgment to hold that A. and R. Brown, Ltd., were to "be deemed to be the occupiers of the dry dock at the time the "accident occurred, and they cannot, therefore, have been "under any statutory duty to the plaintiff. It follows that, "in my judgment, Stable J. was right in dismissing the action "against A. and R. Brown, Ltd." It was not contended that the second defendants were liable at common law, and the appeal must, therefore, be dismissed in their case.

As regards the first defendants, it is contended on their behalf that they are not liable at common law. What is said is that they were not in occupation of the ship or any part of it; they did not, so it is said, invite the plaintiff, and they did not by any positive act create the trap, the omission to light or to put back the hatch cover not being positive acts which would bring them within the rule laid down in *Kimber v. Gas, Light & Coke Co.* (3). It is said, therefore, that they owed no

(1) [1941] 1 K. B. 688.

(3) [1918] 1 K. B. 439, 445.

(2) Ibid. 700.

duty to the plaintiff either to warn him or to light or protect the open access hatch. On the other hand, it is contended by the first defendants and by the plaintiff that the shipowners are liable at common law, as they were, it is said, in actual occupation of the ship, which was their property; they were supplying the current for lighting and some of the lights, though none in the 'tween decks or hold, and they were actively supervising the work being done in the hold upon which the plaintiff was engaged. In my opinion the true view is that when a person invites another to a place where they both have business, the invitation creates a duty on the part of the invitor to take reasonable care that the place does not contain or to give warning of hidden dangers, no matter whether the place belongs to the invitor or is in his exclusive occupation. Although the rule has generally been stated with reference to owners or occupiers of premises, it is indicated by Lord Wright in the case of *Glasgow Corporation v. Muir and Others* (1) that the occupation need not be exclusive. He said there: "Before dealing with the facts, I may observe that in cases of 'invitation' the duty has most commonly reference to the structural condition of the premises, but it may clearly apply to the use which the occupier (or whoever has control so far as material) of the premises permits a third party to make of the premises." Invitors, of course, do not as a rule invite others on business to premises in which the invitors have no business interest or control, but they may have an interest and control which falls short of exclusive occupation, and where they have such an interest and control and invite others to come to the spot on business they are bound, in my opinion, to warn the invitee against concealed dangers of which they know, or ought to know, even if such dangers are not created by their own positive acts. The judgments of Lewis J. and of the Court of Appeal in *Prenton v. General Steam Navigation Co., Ltd.* (2) are illustrations of this principle, and the present case is an a fortiori case. It was there held that the contractors were sufficiently in occupation of the 'tween decks of a ship for the purposes of their work to owe a duty to an employee of their sub-contractors who fell down an unlighted and uncovered access hatch into the hold, although the contractors had finished their work and had at no time worked in the hold. Here, the first defendants were, at the time of the accident the only persons in the physical occupation of the 'tween decks and hold. It may be that they

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(1) [1943] A. C. 448, 462-3.

(2) 77 Ll. L. Rep. 174.

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were not entitled to exclude either the shipowners or even other contractors who might have had business there. But they were there for the purposes of their own business, under contract with the Ministry of War Transport, and they invited the plaintiff to come there to work for their material interest, and in such circumstances they were, in my opinion, bound to warn him of the danger of the open access hatch, which he could not see, and of which they were aware.

As to the shipowners, I am of opinion that in all the circumstances of this case they were not liable, either under the Shipbuilding Regulations, 1931, or at common law. I have already held that the second defendants were not notional occupiers under the regulations, and, in my opinion, paras. b and c of the proviso have no application. It is unnecessary to consider how far the Court of Appeal decided in *Wilkinson v. Rea, Ltd. and Others* (1) that paras. b and c apply where there is no notional occupier, since, in the present case, as the access hatch in question was required to be used for the purposes of repairs and the shipowners did not provide the lighting, the shipowners are not in breach of them. If, therefore, the exceptions in paras. b and c are inapplicable, the shipowners are not in breach of them. At common law I am of opinion that the shipowners' occupation was not sufficient to create a duty to the plaintiff. They had not undertaken to supply any lighting on the 'tween decks or in the hold. The fair inference from the facts is that the cover of the access hatch was off for the purposes of the first defendants, and generally it is not proved that the shipowners were in a contractual position to control the work on the 'tween decks. The position of the shipowners is shown by what the learned judge said at the trial of the action. He said: "As I understand it, the position was this, that, so far as the alterations of this vessel from a cargo ship to a troop-carrying vessel were concerned, your principals"—that is the principals of the witness, who was a servant of the shipowners—"were not consulted as to what was to be done, or where it was done, or by whom and how it was to be done? Was that the position? (A.) Yes, my Lord. (Q.) It was simply done over your heads? (A.) Yes, that is right, my Lord."

The shipowners had been compelled to allow the control of the place in question to be in the first defendants for the purposes of its reconversion as a troopship; they had not

(1) [1941] 1 K. B. 688.

invited either the first defendants or their sub-contractors into the ship, nor had they contracted to supply any lighting on the 'tween decks. I do not think the evidence as to the visit of the marine superintendent or the chief shore officer of the ship-owners to the hold at 11.45 a.m. on the day of the accident establishes that the shipowners had control of the operations of the fourth defendants or of the first defendants.

I am of opinion, therefore, that the appeal ought to be allowed against the first defendants and dismissed against the second and third defendants.

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BUCKNILL L.J. In my view the plaintiff has established his right of action against the first defendants on the principle laid down in *Indermaur v. Dames* (1). I think that he has not established a right of action against the third defendants, the owners of the ship, because they were not occupiers of the No. 2 lower 'tween deck at the time of the accident. As regards the second defendants, Messrs. A. and R. Brown, Ltd., I prefer not to express an opinion as to whether they were the occupiers of the dry dock within the meaning of the proviso in the Shipbuilding Regulations, 1931. I think that in any case they have not committed a breach of any of the regulations contributing to the accident to the plaintiff in that they were not the occupiers of the No. 2 lower 'tween deck. The hatch was clearly a trap on the finding of the learned judge, and on the uncontradicted evidence of the plaintiff, and of Smith, the joiner who was working there. There was no protection round this open hole which might easily have been made by rigging a rail or a line round it; there was no light and there was no warning.

The vital question, in my opinion, is: who were the occupiers of the No. 2 lower 'tween deck at the material time? I have not been able to find a definition of the word "occupier" as used by Willes J. in the case of *Indermaur v. Dames* (1), but it seems to me that in order to be an occupier one must have possession of the premises and control over them. In my view, the first defendants had both, they had possession and control. They had been put there over the heads of the shipowners by the Ministry of War Transport, who had ordered them to effect very extensive alterations throughout the vessel and, in particular, in the lower No. 2 hold and in the No. 2 lower 'tween deck. They were the only firm working on the lower 'tween deck at the time of the accident, they were about to do further

(1) (1866-7) L. R. 1. C. P. 274; L. R. 2. C. P. 311.

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work in the lower hold, and they had already done some work in the lower hold, in fitting boxes round the manhole covers to prevent the sand ballast from blocking them.

The plaintiff was working under a sub-contract with the first defendants, and his work was to assist the first defendants in getting the necessary timber down into the lower hold to carry out the work which the first defendants had to do by order of the Ministry of War Transport. He was, therefore, clearly an invitee of the first defendants. I think it is material to note that when the work of trimming the ballast had been finished, which was work done by the fourth defendants under a direct order of the Ministry of War Transport, the fourth defendants' man who was doing the trimming fetched, not the marine superintendent or the chief officer of the ship, but the foreman of the first defendants to approve the work. It seems to me to be clear that someone must have been the occupier of the lower 'tween deck. The learned judge has found that it was not the shipowners, and I think that on the evidence he was right. I do not myself think that the occupier was the Mersey Docks and Harbour Board. I think that all the evidence indicates that it was the first defendants. For these reasons I think the appeal should be allowed as regards the first defendants.

ROXBURGH J. The plaintiff claims against the first defendants, Grayson Rollo and Clover Docks, Ltd., on the footing of negligence, against the second defendants, A. and R. Brown, Ltd., on the footing of breach of the Shipbuilding Regulations, 1931, and against the third defendants, the shipowners, on both footings.

A. and R. Brown, Ltd. cannot be liable unless they answer the description of "the person who contracts with the owner of the ship or with his agent to execute the work of repair." But what is meant by "the work of repair?" Mr. Wooll has submitted on behalf of the plaintiff that the phrase connotes that work of repair, and that work only, which necessitated the entry of the ship into dry dock. But, in my judgment, the language of the regulation would not justify that interpretation. The work to which the regulation refers must, I think, be the work of repair which is being carried out in dry dock. As the work on which A. and R. Brown, Ltd., were engaged bore no relation to the work which was proceeding on the lower 'tween deck where and when the plaintiff met with

his accident, no interpretation of the phrase "the work of repair" other than that for which Mr. Wooll contended would avail the plaintiff in this case, and accordingly, I hesitate to pursue the many difficulties relating to its interpretation which Scott L.J. expressly left open in the case of *Wilkinson v. Rea, Ltd. and Others* (1). Grayson Rollo and Clover Docks, Ltd., cannot be liable under the regulations because they contracted with the Ministry of War Transport and not with the shipowners. But Mr. Wooll has submitted that the shipowners are liable for breach of paragraphs b and c of the regulations. Mr. Scholefield Allen, for the shipowners, has addressed to us an attractive argument that if there is no person who falls within the description of having contracted with the owner of the ship or his agent to execute the work of repair, paragraphs a, b and c have no application. But it may be that this submission is inconsistent with the decision in *Wilkinson v. Rea, Ltd. and Others* (1). It is, however, unnecessary to pursue this point, because if para. b is applicable where there is no notional occupier, then the words "the purposes of the repairs" must include all the repairs which are actually being carried out in the dry dock. The access hatch was certainly required for these, and accordingly, para. b does not apply to it. Moreover, the evidence is that the shipowners had not undertaken to supply any lighting, (since an undertaking to supply current does not, I think, involve an obligation to supply lighting) and, accordingly para. c does not apply. Accordingly, the shipowners are not liable for breach of the Shipbuilding Regulations, 1931.

On the issues of negligence I found myself on the statement of law in Salmond on the Law of Torts (10th ed.), at p. 469: "In dealing with dangerous premises it is necessary to distinguish between the responsibilities of the owner and those of the occupier or possessor. Generally speaking, liability in such cases is based on occupancy or control, not on ownership. The person responsible for the condition of the premises is he who is in actual possession of them for the time being, whether he is the owner or not, for it is he who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons." In my judgment, on the evidence it is established that Grayson Rollo and Clover Docks, Ltd., were in actual possession of the place at which the accident occurred at the time when the

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accident occurred within the meaning of the phrase as used in the passage which I have just read, and that the shipowners were not. Accordingly, I am in agreement with the conclusions which have been reached by my Lords.

LORD OAKSEY L.J. The plaintiff's appeal will be allowed as against the first defendants Grayson Rollo and Clover Docks, Ltd., and dismissed against the three other defendants. [His Lordship then dealt with costs.]

Judgment accordingly.

Solicitors for plaintiff: *Helder, Roberts, Giles & Co., for John A. Behn, Twyford and Reece, Liverpool.*

Solicitors for Grayson Rollo and Clover Docks, Ltd.: *Berrymans, for Burrell & Co., Liverpool.*

Solicitors for A. and R. Brown, Ltd.: *Laces & Co., Liverpool.*

Solicitors for Shaw Savill & Albion Co., Ltd.: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

Solicitors for William Cooper & Sons, Ltd.: *Gardiner & Co., for A. W. Mawer & Co., Liverpool.*

C. G. M.

Applied. LAVENDER v. DIAMINTS, LTD. [1948] 2 All E.R. 249.

Applied. HOSKING v. DE HAVILLAND AIRCRAFT CO., LTD. [1949] 1 All E.R. 540.

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LIMITED AND ANOTHER.

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Land—Occupier of—Invitor—Limits of invitation.

Master and servant—Building operation—Duty of employer—To take reasonable care to see work properly laid out.

Factory—"Building operation" in factory—Applicability of whole of

Factory Act, 1937—"Safe means of access"—"To every place at which any person has at any time to work"—Meaning of "place"—Factories Act, 1937 (1 Edw. 8, & 1 Geo. 6, c. 67), s. 26, sub-s. 1, s. 102, and s. 152.

All relevant sections of the Factories Act, 1937, and not only those specified in s. 107 as applicable to the building operations specified in that section, apply to "building operations," as generally defined in s. 152, when carried out within the confines of a factory, even when they are carried out, not by the occupiers of the factory, but by their contractors or sub-contractors.

The plaintiff was directed by the foreman of his employers, sub-contractors to the occupiers of a factory, to ascend to a low-pitched attic 3 feet 4 inches high at its apex, in the factory, the horizontal base of which was composed of corrugated iron sheets nailed on to wooden supports, and then to crawl along the sheets and pull out the nails from above, so that the sheets could be removed and used

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elsewhere in the factory. The occupiers had agreed with the sub-contractors that the sheets should be removed, but had left the manner and method by which they should be removed entirely to the sub-contractors. When the plaintiff had removed most of the nails and sheets, one of the wooden supports, obviously inadequate to bear the weight of a man, broke, and the plaintiff fell to the floor below and was injured.

Held, that his employers, the sub-contractors, were liable to the plaintiff in damages at common law in that they had failed to use reasonable care to lay out the work, so that it should not be a source of danger to him, though the word "system" was hardly appropriate in the case of work which was not repetitive; but that the occupiers of the factory were not liable to the plaintiff under the rule laid down in *Indermaur v. Dames* (1866-7) L. R. 1, C. P. 274; L. R. 2, C. P. 311; in that although the plaintiff was an invitee of the occupiers to all ordinary parts of the premises, the invitation did not extend to places which he could not reasonably be expected to use and, therefore, the unusual danger incidental to the work was no concern of the occupiers.

Speed v. Thomas Swift & Co. Ltd., [1943] K. B. 557 applied.

Held, also, that the occupiers were liable to the plaintiff in damages under s. 26, sub-s. 1, of the Factories Act, 1937, in that they had failed to provide and maintain, so far as was reasonably practicable, a safe means of access to the place at which the plaintiff had to work, i.e., to take out the nails, and that this also was a cause of his injury.

Held, also, on a claim under sub-s. 2 of s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, for contribution made by the occupiers, liable under the Factories Act, 1937, against the sub-contractors, liable at common law, that, since the occupiers had employed contractors to do the work leaving the method and manner of it entirely to the sub-contractors, all proper precautions were the province of the sub-contractors and the responsibility for the injury was that of the sub-contractors. Accordingly the contribution to be recovered by the occupiers should amount to a complete indemnity.

ACTION.

The plaintiff was a steel erector and sheetor's mate employed by the second defendants, Smith (Erectors), Ltd. The first defendants, Burt, Boulton and Hayward, Ltd., were the occupiers of a large factory in Silvertown, being a factory under the Factories Act, 1937. Along the top of the Carbolite House in the factory, throughout its length, was a lantern for the purposes of light and ventilation. The two slopes of the roof of the lantern were glazed and the two sides of the lantern were each fitted throughout with four or five rows of ventilating louver-boards and the roof proper of the Carbolite House began on each side at the base of the louver-boards. During the war,

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the glass of the lantern had been blacked out. Wooden supports two inches by three inches were run horizontally across the interior of the lantern from louver-board to louver-board, and, above these supports, were nailed sheets of corrugated iron, which served to augment the black-out and to catch any glass which might fall, thus forming a kind of attic in the lantern. The trial judge found that this work had been done in a very makeshift way, as would happen in war-time. The span of each wooden support was about six feet and the distance from the corrugated iron sheets to the interior apex of the lantern was about three feet four inches. There were two solidly built gantries which ran along the greater part of the length of the building, the upper one being some seven feet below the level of the horizontal screen of corrugated iron sheets.

The factory had been damaged by enemy action and the occupiers employed contractors who, in turn, employed sub-contractors—the employers of a foreman Reeves and his assistant, the plaintiff, to carry out work at the factory. Reeves and the plaintiff carried out such work at the factory as one Reader, on behalf of the occupiers, asked them to do. In February 1945, authority was given by the occupiers for the corrugated iron sheets, a commodity in short supply, to be removed from the lantern of the Carbolic House for use in the factory elsewhere, but the occupiers did not authorize the manner or the method in which the work should be done. That was left to Reeves, the foreman of the sub-contractors, a heavier man than the plaintiff, who, ascending an iron ladder to the upper gantry, knocked out one of the corrugated iron sheets and ascending to “the attic,” crawled through and along its length and back, and then told the plaintiff to take his place and pull out the nails fastening the sheets to the wooden supports, from above. It was important that the corrugated iron sheets should not be knocked up from below as that would make holes in the sheets. Starting from one end of “the attic” the plaintiff pulled out the nails from the sheets and then starting from the other end, he had nearly reached the middle again, when, as he was pulling out the nails of the last two or three sheets, one of the wooden supports broke and the plaintiff fell some twenty to twenty-five feet to the floor and was severely injured. The trial judge found that the wooden support which broke had a bolt hole in it which weakened it and that there was a real risk of a break, if any weight came on top of it. The plaintiff claimed damages at common law

from both defendants and from the occupiers under the Factories Act, 1937.

Paull K.C. and *Humsfrey Edmunds* for the first defendants, the occupiers of the factory. These defendants were not liable at common law. The plaintiff at the time he met with his injury and in the place where he met with his injury, was not an invitee of the occupiers. He was not an invitee to climb on to these corrugated iron sheets since it was obvious that these sheets were not there to be climbed upon. The occupiers authorized the sub-contractors to take the sheets away for work elsewhere in the building; the method to be adopted in taking them away was left to the sub-contractors. As Lord Atkin said in *Hillen and Pettigrew v. I. C. I. (Alkali), Ltd.* (1): "This duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use. As Scrutton L.J. has pointedly said: " 'When you invite a person into your house to use the stair- ' ' case you do not invite him to slide down the banisters ' " (2). Even if it is assumed that the plaintiff was invited to go up to the lantern to remove the sheets, it would only be in a way and by a method sanctioned by the skilled sub-contractors, the plaintiff's employers. If the plaintiff had asked the occupiers how he was to get there, the answer would have been that is a matter for your employers; your foreman will direct you. There was, therefore, no unusual danger of which the occupiers knew or ought to have known: *Indermaur v. Dames* (3).

Nor were these defendants liable under s. 26 of the Factories Act, 1937 (4), since the work on which the plaintiff was engaged was a building operation. See the definition of that term in

(1) [1936] A. C. 65, 69.

(2) *The Carlgarth* [1927] P. 93,

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(3) (1866-7) L. R. 1 C. P. 274; 2 C. P. 311.

(4) By s. 26 of the Factories Act, 1937:—(i.) "There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place

" at which any person has at any time to work.

By s. 107:—(1.) "Subject as hereinafter in this section provided, the provisions of this Act hereinafter in this sub-section mentioned shall apply to building operations undertaken by way of trade or business " that is to say" (S. 26 is

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s. 152 of the Act. By s. 107, sub-s. 1, of the Act "the provisions of this Act, hereinafter in this sub-section mentioned, shall apply to building operations undertaken by way of trade or business." Section 26 of the Act is not a provision mentioned in the sub-section. This section, therefore, does not apply to a building operation. The liability in the case of building operations is laid on the employer of a workman. See the Building Regulations, 1926 (St. R. & O. 1926, No. 738), made under s. 79 of the Factory and Workshop Act, 1901 (see ss. 60 and 159, sub-s. 1, of the Factories Act, 1937). It would be absurd if such provisions as those in ss. 25 and 26 of the Factories Act, 1937, which by their phraseology do not deal with building operations were held applicable to building operations, where the liability is and always has been on the employer and that is so whether the building operations take place within or without a factory. The nature of the provisions of the Factories Act, 1937, which, by virtue of s. 107, are to be applicable to the building operations there specified, supports my argument. So does a perusal of the Building Regulations, 1926. See regs. 13, 15 and also 32 to 36 with which compare s. 24 of the Factories Act, 1937. If a chain were brought into a factory the condition of which was in breach of reg. 37 and of s. 23, on whom would the liability fall? It is plain on the employer and contractor under reg. 37, and not on the occupier of the factory under s. 23. Regulation 37 takes the place of s. 23 in the case of building operations. Compare also reg. 45 with ss. 12 to 14. If a workman meets with an injury in the case of a building operation, the Building Regulations, 1926, and those provisions of the Factories Act, 1937, which are scheduled in s. 107, sub-s. 1, of that Act in the case of the building operations there specified, only are applicable. Together, they make an intelligible code for building operations.

If this contention is wrong and s. 26, sub-s. 1, of the Factories Act specified in the parts of the Act specified in the sub-section.)

By s. 152:—"In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:— . . . 'Building operation' means the construction, structural alteration, repair or maintenance of a building (including re-pointing, re-decoration and external cleaning of the structure), the demolition of a building, and the preparation for, and laying the foundation of, an intended building, but does not include any operation which is a work of engineering construction within the meaning of this Act."

Act, 1937, does apply to the building operation on which the plaintiff was engaged the place where the plaintiff was working over the wooden support which broke was not a means of access to the place where the plaintiff had to work, within the meaning of the sub-section, but the place where he had to work. The plaintiff was not injured by lack of the provision or maintenance of a safe means of access to the place of work within the meaning of the sub-section and there was no breach of it. The words "safe means of access" in s. 26, sub-s. 1, refer to a safe way for the workman to get to his work and not to an appliance such as a staging, connected with the performance of the work. See the judgment of Tucker J. in *Lovell v. Blundells and T. Albert Crompton & Co., Ltd.* (1). Further, there was no breach by the occupiers of the terms of s. 26, sub-s. 2, since that sub-section is limited to the case: "where any person is to work" "at a place from which he will be liable to fall a distance more than ten feet." The essence of the offence is that the person "is to work" at such a place. But the occupiers in the case never required the plaintiff to work at this place or at all. The sub-section has no reference to the soundness of material used in construction but only to the provision of fencing or other means for ensuring safety where there is no secure foothold and, where necessary, handhold. The occupier is to make this provision "so far as is reasonably practicable." It cannot be practicable if my clients have never required the plaintiff to go to such place of work.

Even if the court should be against me in law, the real responsibility of the occupiers for this injury to the plaintiff is nil and on their claim for contribution against the sub-contractors and employers of the plaintiff under sub-s. 2 of s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, they should be awarded a complete indemnity.

R. Marven Everitt for the sub-contractors. As to the claim in the action these defendants are not liable to the plaintiff. The only duty they owed was the normal employer's duty to his workmen, but in this case the work was being performed on someone else's premises. The duty was one of reasonable care in the circumstances, and did not extend to a duty to see that the premises as such were safe: *Taylor v. Sims and Sims* (2). The cause of the plaintiff's accident was not any breach of duty of these defendants, but was the unsafe condition of the premises. These defendants did not erect the

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(1) [1944] K. B. 502, 507.

(2) (1942) 167 L. T. 414.

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corrugated iron sheets, and their foreman Reeves, a heavier man than the plaintiff had crawled all over them before setting the plaintiff to work. The fact that other methods could have been adopted to do the work is not relevant. The test is, was the method adopted a reasonably safe one in the circumstances? These defendants were not in occupation of the corrugated iron sheets, and the plaintiff was the invitee of the occupiers, the first defendants, who are alone liable to him. Furthermore, the occupiers owed a duty to the plaintiff under s. 26, sub-s. 1, of the Factories Act, 1937. They were the occupiers of the factory, *Smith v. Cammell, Laird & Co., Ltd.* (1). As to whether there was a breach of s. 26, sub-s. 1, and as to the contention of the first defendants that this sub-section does not apply to a building operation when that building operation is conducted in a factory, I adopt the argument about to be addressed to the court by counsel for the plaintiff.

As to the claim for contribution by the occupiers from the sub-contractors. If contrary to their contention the sub-contractors are liable to the plaintiff at common law, it is submitted that at least 50 per cent. of the damages should be borne by the occupiers. They were guilty of a breach of statutory duty quite apart from a breach of their duty to their invitee. Where there is a breach of statutory duty, it is submitted that a substantial proportion of the damages should be borne by the occupier of the premises guilty of the breach. It is true that the second defendants were independent contractors, skilled and in charge of the work, but the occupiers ought not to escape liability when they themselves are the persons who have committed the breach of statutory duty and in fact committed a criminal offence as a result of which the plaintiff has been injured. It is submitted that the word "responsibility" in sub-s. 2 of s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, must be construed as meaning "causally responsible." It is submitted that this must be so because the section is dealing with liability in tort and liability in tort does not exist unless the *dānnum* results from or is caused by the *injuria*.

Beney K.C. and *Edgedale K.C.* for the plaintiff. We adopt what each of the defendants has said as to the liability of the other to the plaintiff. The defendant sub-contractors, the employers of the plaintiff, have relied on the decision

in *Taylor v. Sims and Sims* (1) and it was suggested that employers owe a different degree of care to their workmen when they are to work on premises occupied by others. There can be no such dividing line. Reeves, the plaintiff's foreman, took no precautions before he ordered the plaintiff to ascend to this attic in the lantern and to work there. He should have made an adequate inspection of those wooden supports and the corrugated iron sheets nailed thereto to see whether it was safe for the plaintiff to put his weight on them. No parallel can be drawn between the facts in this case and those in *Taylor v. Sims and Sims* (1). It is the duty of the employer to provide a safe system of working in relation to the circumstances of each particular job and, if he delegates that duty, he remains responsible for any inadequacy of the system. See the observations of Lord Greene M.R. in *Speed v. Thomas Swift and Co., Ltd.* (2), on what is meant by a safe system of working, when he states that it is the master's duty to decide the lay-out of the job "and, in doing so, he must pay proper regard to "the conditions affecting the safety of his men." The pleaded defences of contributory negligence and of *volenti non fit injuria* are not now relied on. As to the liability of the occupiers at common law, that would appear to depend on the knowledge of their agent, Reader. He knew that the corrugated iron sheets were to be obtained by the sub-contractors and employers from this place. If he knew that the plaintiff was to be sent up on to them, the plaintiff was an invitee of the occupiers, but see *Walker v. Midland Ry.* (3). Was this a place to which the plaintiff might be reasonably supposed to be likely to go in the reasonable belief that he was entitled or invited to do so?

The occupiers were liable under s. 26, sub-s. 1, of the Factories Act, 1937, in that they had not, so far as practicable, provided and maintained a safe means of access to the place where the plaintiff had to work, i.e., to the place where he was working when the wooden support gave way. In fact they provided no means of access at all. *Prima facie* the duty is laid on the occupier. The contention of the occupiers that s. 26, sub-s. 1, does not apply to a building operation when that building operation is conducted in a factory, is fallacious. See the terms of s. 26, sub-s. 2. It is clear that the sections applied to building operations by s. 107 of the Act are by the terms of that

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(1) 167 L. T. 414.

(3) (1886) 55 L. T. 489.

(2) [1943] K. B. 557, 563.

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section made to apply to them when they are not conducted in a factory. When building operations are conducted in a factory all the relevant sections of the Factories Act, 1937, are applicable and this is so even when the building operations are being carried out by a contractor or a sub-contractor. See s. 149. In any case it is a straining of language to say that the operation on which the plaintiff was engaged was a building operation. [*Rippon v. Port of London Authority and J. Russell and Co.* (1) was referred to.] We do not rely here on the terms of s. 26, sub-s. 2, of the Act.

DENNING J. The question in point of law is where does the responsibility rest? I will deal with the question first at common law and secondly under the Factories Act, 1937. At common law it is said that the occupiers were inviters of the plaintiff and liable on that account to him. But, although workmen who come on premises are invitees on all ordinary parts of the premises, the invitation only extends to places which they may reasonably be expected to use. In this case, the invitation did not extend to crawling along and being on top of these corrugated iron sheets on top of these timbers. The invitation did not extend so far. The plaintiff was not authorized by the occupiers to go there. The method of taking down the corrugated iron sheets was no concern of the occupiers. In any event the duty of invitor is only in respect of unusual dangers of which he knows or ought to know. In this case the dangers were dangers incidental to the work of which the contractors and their foreman Reeves ought to have known, but which were not the concern of the occupiers. I do not think that the occupiers were in breach of any duty to the plaintiff of reasonable care in respect of the condition of the premises. I hold, therefore, that there is no liability on the occupiers to the plaintiff at common law.

The next question at common law is whether the sub-contractors whom I shall call the contractors are liable to the plaintiff. It was a duty of the contractors as employers of the plaintiff to use reasonable care to lay out the work so that it should not be a source of danger to him. It was their duty, as it is put, to take reasonable care "to provide a safe system." The word "system" is hardly appropriate in the case of work which, like this, was not repetitive. This was a case of one job which had to be laid out, and it was the duty of Reeves

as foreman, put there to do his employers' work, to use reasonable care to see that the job was properly laid out. I am quite satisfied that that duty of the employers, delegated as it was to Reeves, was not fulfilled. They were guilty of negligence in laying out this job, because it is plain that, before any man was sent to this small, confined space on the top of these corrugated iron sheets, the most elementary precaution would have been to examine the timbers and examine the situation to see whether they were safe for a man to be sent up there. If these timbers had been inspected by the light of a torch or in any way at all, it would, or should, have been seen that the timbers were not suitable to bear the weight of a man. They were obviously second-hand. Some had been charred. Another one had this bolt hole in it and was obviously insufficient to take the weight of a man. Several suggestions were made as to what should have been done, such as, to arrange that the nails should be reached by taking out the louver-boards and getting at them from the roof, or by erecting a scaffolding underneath the corrugated iron sheets and getting at the nails in that way. Probably the right course would have been not to attempt to remove the nails from the top at all. The labour or the risk did not justify it for the results to be obtained. Probably the right thing would have been simply to knock the sheets up from the bottom, may be doing some damage to the sheets, or to saw through the timbers. But to send this man up on the top of those corrugated iron sheets on these flimsy and insubstantial timbers, a weight for which they were never designed, was, I think, negligence. The principles which Lord Greene M.R. stated in *Speed v. Thomas Swift & Co., Ltd.* (1) apply. Although it was pleaded that the plaintiff had been guilty of some contributory negligence, that point was not pursued at the trial, I think, quite rightly, because in this case the plaintiff was directed by his foreman, the responsible person, to go up and do the work. He was acting on instructions and I do not think it was contributory negligence to carry them out. It was also pleaded that the plaintiff voluntarily took the risk. That, again, was not pressed. It was clearly inapplicable. The position at common law, therefore, is that the contractors are liable to the plaintiff, but not the occupiers.

The other head of claim was under the Factories Act, 1937. It was said for the plaintiff that the occupiers were the occupiers

(1) [1943] K. B. 557.

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of the factory and liable accordingly under the Factories Act, 1937, particularly under the provisions of s. 26, sub-s. 1, by which "there shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work." It is said that the means of access which was provided to these nails—the place where he had to work and draw them out—was unsafe and that therefore there was a breach of the sub-section for which the occupiers are liable. The occupiers raised an important point under the Act. They said that these were "building operations" and, that, in respect of building operations s. 26 did not apply because the only provisions which applied to "building operations" were those specified in s. 107 which do not include s. 26. In my opinion, however, s. 107 is only dealing with "building operations" which are not conducted in a factory. As a matter of construction I am satisfied that in respect of building operations which are conducted in a factory, the whole of the Factories Act, 1937, applies. Any other construction would lead to remarkable results. For instance, in this case if a man were sent up to clean at the top of this building it would not be a "building operation," and would be within the Factories Act, 1937, but if he were sent up to repair or maintain part of it, it would be a "building operation" and, accordingly, would be outside the Act. I am quite satisfied that no such result was intended. It is quite impossible to extricate building operations within a factory from other operations within a factory. When you are in a factory the whole of the Factories Act, 1937, applies. Section 26, in my judgment, applies to this case and the occupiers are responsible for seeing that there is provided and maintained safe means of access. Although this may appear a harsh law when they employ contractors or sub-contractors, the consequences so far as criminal responsibility is concerned can be fairly adjusted under s. 137 of the Act, and, so far as civil liability is concerned, can be fairly adjusted under the Law Reform (Married Women and Tortfeasors) Act, 1935. I hold, therefore, that, for the safeguarding of people in factories s. 26 applies, and puts the responsibility on the occupier, even though the building operations are being carried out by a contractor.

The next question is, was there a breach of sub-s. 1 of s. 26? That depends on what was the "place" at which the plaintiff had to work and what was the "access" to it. I think the

"place" where the plaintiff had to work was the place where he had to pull out the nails. It was not on the gantry or on the ladder. It was the place between the corrugated iron sheets and the skylight where he had to pull out the nails. Safe means of access should have been provided to that place. It could have been provided, either by taking out some of the louver-boards and getting to the nails from the roof or by erecting a scaffolding underneath and getting at them in that way. I have suggested that the nails need never have been pulled out from above at all. Howsoever that may be, if that was the work to be done, pulling out nails in order to save these corrugated iron sheets then the place of work was on the top above the nails, and safe means of access should have been provided to those nails. What was the means of access which was, in fact, used? It was just crawling along these corrugated iron sheets and lying or kneeling on top of them, pulling out nails. That was the means of access, a means of access which the plaintiff was partially demolishing, as he was going along. That means of access was most unsafe to get to the place where he had to pull out the nails. He had to be on this corrugated iron over these flimsy timbers. I am satisfied that there was no safe means of access, and the fact that it was unsafe is a breach of the Factories Act, 1937, for which the occupiers are liable in damages. They might be excused under s. 137 from criminal responsibility but they remain liable to a civil action to any person injured by their breach of the Act. In the result, at common law, the contractors are liable and under the Factories Act, 1937, the occupiers are liable, and I assess the damages, including special damages, at the sum of 4,000*l.*

The final question is, how are the damages to be borne as between the two defendants, whom I have held to be liable. Under sub-s. 2 of the Law Reform (Married Women and Tortfeasors) Act, 1935, I can adjust the position between them according to what is just and equitable, having regard to the extent of responsibility for that damage. In a case of this kind, where the occupiers employ contractors to do work, leaving the manner of it entirely to them, all proper precautions being the province of the contractors, I am satisfied that the responsibility for the accident and the damage is that of the contractors. I direct that the contribution to be recovered by the occupiers from the contractors shall amount to a complete indemnity, and I shall direct, therefore, that, as to these damages, the 4,000*l.* that I awarded, the occupiers who have been made

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1947 liable by reason of the Factories Act, 1937, shall be indemnified
in that sum by the contractors.

Judgment accordingly.

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Solicitor for the plaintiff : *W. H. Thompson.*
Solicitors for the occupiers : *L. Bingham & Co.*
Solicitors for the sub-contractors : *Hair & Co.*

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Affirmed. L. P. T. B.
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Highway—Pedestrian crossing places—Precedence of foot passengers over vehicular traffic—Crossing-place controlled by light signals—Duty of drivers of vehicles approaching crossing—Contributory negligence of foot passenger—Pedestrian Crossing Places (Traffic) Regulations, 1941 (St. R. & O. 1941, No. 397), reg. 3.

By reg. 3 of the Pedestrian Crossing Places (Traffic) Regulations, 1941 : " The driver of every vehicle approaching a crossing shall, " unless he can see that there is no foot passenger thereon, proceed " at such a speed as to be able if necessary to stop before reaching " such crossing."

The driver of an omnibus was approaching a crossing-place controlled by traffic lights, which were at the material time in his favour, when a foot passenger negligently attempted to cross against the light and emerged about nine feet in front of the omnibus, from behind a stationary vehicle which partially obscured the omnibus driver's view of the crossing. The driver at once applied his brakes, but was unable to avoid the foot passenger, who was injured. The omnibus came to rest with its wheels on the crossing place :—

Held (by Cohen and Asquith L.JJ., Lord Greene M.R. dissenting), that reg. 3 applied to controlled as well as to uncontrolled crossing-places, and that as the stationary vehicle was obscuring the driver's view of a part of the crossing-place, he could not " see that there was no foot-passenger thereon " and was under a statutory duty to approach the crossing at such a pace that he could if necessary stop before reaching it ; and that, though the action was based on negligence, not on breach of statutory duty, the latter could be relied on as evidence of negligence if it sufficiently appeared from the particulars of negligence alleged by the plaintiff.

APPEAL from Humphreys J.

On November 23, 1945, the plaintiff, Mrs. Upson, was knocked down and injured by an omnibus belonging to the defendants, the London Passenger Transport Board, at the junction of

Baker Street and Blandford Street. At that point there are traffic lights controlling the traffic crossing Baker Street. There is also a pedestrian crossing, with a central refuge, the nearest point of which is 17 feet 9 inches from the eastern kerb. At the time of the accident, the plaintiff was crossing from east to west, and after she had passed about 15 feet of the 17 feet 9 inches to the refuge, she was struck by a southbound omnibus, which was travelling at about 15 miles an hour with the traffic lights in its favour. There was a taxicab drawn up on the near side with its wheels actually on the crossing, so that the plaintiff's view of southbound traffic and vice versa, was masked by the width of the taxicab. The plaintiff ran out from the front of the taxicab, either failing to notice, or ignoring, the fact that the lights were against her. The omnibus, as she came into view, was about nine feet away. The driver at once applied his brakes, but the offside front wing struck the plaintiff and knocked her down. The omnibus came to rest with its front wheels on the crossing. The plaintiff brought her action based on negligence, alleging as one of the particulars of negligence a failure to give the plaintiff free and uninterrupted right of passage over the crossing. No breach of statutory duty was pleaded as such. Humphreys J. held that the driver was negligent and that the case fell to be decided on the basis of the common law without regard to the Pedestrian Crossing Places (Traffic) Regulations, 1941 (1). He assessed the damages

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(1) The Pedestrian Crossings (Traffic) Regulations, 1941, reg. 2 : "police constable or by light
" For the purpose of these regula- " signals shall allow free and un-
" tions unless the context other- " interrupted passage to any foot
" wise requires the expression " passenger who is on the carriage
" " crossing " means a crossing " way at such crossing, and every
" place for foot passengers indi- " such foot passenger shall have
" cated by a traffic sign prescribed " precedence over all vehicular
" for the purpose by regulations " traffic at such crossing."
" made by the Minister."

Reg. 3 : " The driver of every " Reg. 5 : " The driver of every
" vehicle approaching a crossing " vehicle at or approaching a
" shall, unless he can see that there " crossing at a road intersection
" is no foot passenger thereon, " where traffic is for the time being
" proceed at such a speed as to be " controlled by a police constable
" able if necessary to stop before " or by light signals shall allow
" reaching such crossing." " free and uninterrupted passage
" to every foot passenger who has
" started to go over the crossing

Reg. 4 : " The driver of every " before the driver receives a
" vehicle at or approaching a " signal that he may proceed over
" crossing where traffic is not for " the crossing."

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at 500*l.* but reduced the award to 250*l.* in view of the plaintiff's contributory negligence. The defendants appealed.

Fox Andrews K.C. and *Armstrong Jones* for the defendants. There was no proper ground for holding the driver of the omnibus to have been negligent so as to be liable at common law. The omnibus was only driving at a speed of 15 miles per hour in approaching cross-roads on which were showing a green light and owing to the taxi drawn up at the side and overlapping the pedestrian crossing, the driver could not see the plaintiff till he was within nine feet of the crossing. That is the effect of the evidence and on that evidence he was not guilty of negligence. If there was any doubt of this, the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, reg. 5 makes the matter even clearer. Under that regulation the only duty imposed on a driver in regard to a crossing controlled by lights, is to allow uninterrupted passage to a pedestrian "who has started to cross before the driver receives a signal "that he may pass." Here the lights had been in favour of the omnibus for some time so that plaintiff must have started to cross with the lights against her. It is true that it is not unlawful for a pedestrian to cross against the lights although he is requested not to do so. The code provides two different tests of conduct according as a crossing is or is not a controlled crossing. The only recognized offence of a pedestrian is under reg. 7 for staying too long on a crossing. The Highway Code does not create offences, but it can be taken into account as tending to establish any contention in proceedings. It provides that a pedestrian is only to cross the road when the appropriate line of traffic is held up. [Lord Greene M.R. *Bailey v. Geddes* (1), is an authority that at an uncontrolled crossing a driver must be satisfied that no pedestrian is on it. But is not a driver under a duty even at a controlled crossing?] Regulation 5 was under consideration in *Joseph Eva, Ltd. v. Reeves* (2). [Lord Greene M.R. There two vehicles were involved so that reg. 3 is not taken into account.] Regulation 3, in providing that the driver of a vehicle must, unless he can see that there is no foot passenger on the crossing, go at a speed enabling him to stop before reaching the crossing, cannot be taken to apply without variation to the case of a controlled crossing, otherwise reg. 5 would be unnecessary. When a driver has seen a signal to proceed before a pedestrian is on the crossing, he cannot be bound to stop before reaching

(1) [1938] 1 K. B. 156.

(2) [1938] 2 K. B. 393.

the crossing. If reg. 3 had an unrestricted application in such a case, the driver's position would be made impossible on a road with a number of lights and many vehicles drawn up on the side of the road.

[They also referred to *Chisholm v. London Passenger Transport Board* (1).]

Russell Vick K.C. and *I. F. Reuben* for the plaintiff. Although reg. 3 was not referred to in the pleadings, it was dealt with by the learned judge and must be taken into account; if necessary this court would, it is suggested, allow the pleadings to be amended. But quite apart from the regulations, the driver was guilty of negligence. He was approaching a partially obscured crossing and he ought to assume that a pedestrian may be crossing: see *Chisholm v. London Passenger Transport Board* (1). Pedestrian crossings were set up for foot passengers' safety. They referred to *Wilkinson v. Chetham-Strode* (2). It was here admitted at an early stage that the plaintiff was a careless pedestrian but the driver was negligent also. If a green light meant that the driver must proceed, the plaintiff would be in a difficulty, but it is only provided that he may proceed. Here the driver was going at such a speed that he could not stop the omnibus in nine feet. There is a clear liability at common law. Further, the driver ought to have seen the plaintiff before she had entered on the crossing as a passenger on the omnibus did. Moreover, owing to the fact that the taxi obstructed his view, the driver ought only to have proceeded at a pace that would enable him to pull up before the crossing.

But apart from the position at common law, the driver was under a clear duty under reg. 3 to go so slowly that he could pull up before the crossing, as he had not a clear view of the crossing. It is not suggested that the actual decision in *Chisholm's* case (1) was wrong. Then a pedestrian embarked on an empty crossing when a vehicle was too near and had the lights in its favour. Here there was no clear vision. Regulation 3 applies both to controlled and uncontrolled crossings, the distinction between which is not drawn till reg. 4. *Bailey v. Geddes* (3) and *Chisholm v. London Passenger Transport Board* (1) are both correctly decided, and are not inconsistent.

Cur. adv. vult.

July 31, 1947. The following judgments were read:

(1) [1939] 1 K. B. 426.

(3) [1938] 1 K. B. 156.

(2) [1940] 2 K. B. 310.

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LORD GREENE M.R. It was admitted at the trial that the plaintiff was negligent. What she did was to hurry across the crossing without taking the trouble to satisfy herself that the traffic lights were in her favour (which they were not), and thinking that she had time to reach the refuge before the defendants' omnibus, which she saw was approaching the crossing, would reach her. For conduct such as this negligence is too feeble a word. The evidence shows as clearly as anything can be shown that the plaintiff was guilty of reckless disregard of her own safety; and she now charges with negligence the driver of the omnibus by whose skill and promptitude, and by the care which he had shown in having his omnibus under control—his speed was about 15 miles an hour, a perfectly reasonable speed in the circumstances—her life was in all probability saved. The learned judge used language intended in part to palliate her conduct. "The plaintiff," he said, "I do not find was negligent in making an honest miscalculation, (it is a very difficult thing to do) as to the speed at which the bus was coming and whether it was quite safe for her to cross but it turned out to be very nearly safe but she just miscalculated it." I am afraid that I must respectfully dissent. Honest miscalculation is surely no excuse for the plaintiff's conduct. She tried to cross in front of an oncoming vehicle when, as the witnesses who watched her movements, Mrs. Grenfell and the conductor, saw at once, an accident was inevitable since she could not possibly reach the refuge before the omnibus would be on her. A very large number of traffic accidents are caused by honest miscalculations. But, when the person who makes the miscalculation acts upon it in circumstances in which a reasonable person either would not make a miscalculation or would not risk acting on the chance that his calculation was correct, that person cannot, in my opinion, turn round and say that his action was not negligent—negligent towards others if he is charged with such negligence, negligent of his own safety if the charge is one of contributory negligence.

I now come to the charge of negligence against the driver of the omnibus on which the claim is based. Humphreys J. approached this question in the following manner. He first examined the position as it would have been at common law irrespective of the Traffic Regulations and the Highway Code, but on the footing that traffic lights giving an intelligible warning were, in fact, there. Having come to the conclusion that on this basis the driver was negligent in not keeping a

proper look-out he proceeded to refer to the Traffic Regulations, but decided that he could dismiss them from his mind since there was nothing in any of them he said " which abrogates the " old common law rule which requires the driver of every vehicle " to use reasonable care not to injure other users of the road " whether those others are or are not themselves guilty of " negligence."

Now the whole of the learned judge's judgment turns on his finding that the driver was negligent in failing to keep a proper look-out. It is on this point that, in my respectful opinion, the judge fell into an error. The main argument presented to us on behalf of the plaintiff was the same as that relied on by Humphreys J., namely, failure to keep a proper look-out, and I propose to deal with that before I come to consider an additional argument based on reg. 3 of the Pedestrian Crossing Places (Traffic) Regulations, 1941. This latter argument can best be dealt with separately.

In considering the position in which this driver was as he approached the crossing, and what was the extent of his duty to take care, it is, in my view, misleading to ignore the regulations and the Highway Code, which have an important bearing on the extent of that duty, so far as regards pedestrians. To say that a driver was negligent in failing to keep a proper look-out implies, of course, that in the circumstances it was his duty to keep the particular look-out which he did not in fact keep. The existence of those provisions of the regulations and the Highway Code that indicate what the conduct of pedestrians should be in relation to a crossing controlled by lights or the police is a very relevant circumstance in considering the assumption, which a careful driver approaching such a crossing is entitled to make.

The driver of the omnibus was entitled to assume that the plaintiff, like other pedestrians, would conform to common sense and ordinary care in the presence of an adverse signal, particularly in view of the provisions of the Highway Code. Paragraph 98 of the Code in force at the time, which forms part of the instructions to pedestrians, was as follows: " At controlled crossings, i.e., wherever traffic is controlled by " police or signals, cross the road only when the appropriate " line of traffic is held up."

By para. 28 of the Traffic Signs (Size Colour and Type) Provisional Regulations, 1933, sub-para. (iii.) it is provided that " the green signal shall be taken to indicate that vehicular

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"traffic may pass the signal and proceed straight on
"with due regard to the safety of other users of the road."

The concluding words of this extract do not mean that a driver is to drive on the assumption that pedestrians will disobey the lights; if it did, every driver would have to slow down to a snail's pace every time he approached a controlled crossing. It merely means, in my opinion, that the green light does not excuse a driver from the ordinary duty to take care and reminds him that he must pay due attention to the rights of other users of the road. Regulation 3 of the Pedestrian Crossing Places (Traffic) Regulations, 1941, raises a separate point as I have already said. Regulation 4 has no application to controlled crossings. Regulation 5 directs drivers at or approaching a controlled crossing "to allow free and uninterrupted passage to every foot passenger who has started to go over the crossing before the driver receives a signal that he may proceed over the crossing." This regulation has no application to the present case. Its object is to give precedence to pedestrians who have already started to cross when the driver receives the green signal. This the plaintiff had not done. The regulation, however, implies that a pedestrian who starts to cross after the traffic has received the green signal has no such right of precedence although, of course, a driver who observes such a pedestrian must take every reasonable step to avoid injuring him.

In my opinion, a driver approaching a controlled crossing when the lights are in his favour is entitled to assume that pedestrians will conform to the traffic lights since no reasonable and careful pedestrian would fail to do so. I must dissent entirely from the proposition that a driver who is entitled to assume that no reasonable and careful person will act in disregard of the signals is nevertheless under a duty to be looking out for the possibility that some person may so act and to drive in such a way as to be able to avoid a person who does in fact so act. If this were the standard of care required of a driver approaching a controlled crossing with the lights in his favour it would mean that instead of watching the road in front of him he would be under a duty to keep watch on the pavement (on both sides of the road in cases where there was no refuge) for the possibility of an action being taken by a pedestrian which no reasonable and careful pedestrian can be assumed to be likely to take—namely, to cross against the lights. If such be the standard of duty I venture to say that there is not a

driver who conforms to it, as anyone can see who watches motor traffic at a controlled crossing when the lights are in its favour. Indeed, if the standard of duty at such a crossing were that laid down by the learned judge, one of the main purposes of traffic lights, namely, to facilitate a speedy flow of traffic, would be entirely defeated.

The true view, in my opinion, is that a driver approaching a controlled crossing, whether it be controlled by lights or by the police, with the light signal or the police signal in his favour, is entitled to proceed on the assumption that pedestrians will conform to the indications given to them as to what their behaviour should be when the signals are against them; and that he is under no duty to keep a look-out for the possibility of a pedestrian disobeying the signals or to drive on the assumption that a pedestrian may at any minute do so.

But let me not be misunderstood. If a driver approaching such a crossing does in fact see that a pedestrian is crossing or apparently is intending to cross against the signals it is the duty of the driver to do everything that he can reasonably do in the circumstances to avoid running the pedestrian down. Failure to take all reasonable steps to avoid injuring someone who is himself seen to be negligent is itself negligent. But this is an entirely different thing to saying, as Humphreys J. said, that the driver is guilty of negligence if he fails to see a pedestrian crossing or intending to cross against the lights. To say this, as I have pointed out, implies that the driver is under a duty to be on the look-out for the possibility of a pedestrian so acting, i.e., acting in a manner in which the driver is entitled to assume that a pedestrian will not act.

Humphreys J. appears to have based his opinion that the driver failed to keep a proper look-out on three propositions (1.) that the driver knew from experience that a pedestrian might cross against the lights; (2.) that he knew that he was not entitled to run a pedestrian down, merely because he was negligent; (3.) that the conductor and Mrs. Grenfell who were inside the omnibus saw the plaintiff hurrying across the pavement with the obvious intention of attempting to cross and that the driver, if instead of watching the road he had turned his eyes towards the pavement as they did, must have seen what they saw and drawn the inference that they did. These propositions, in my opinion, do not support the conclusion which the learned judge based on them. As to the first proposition, the fact that a driver knows that other people on occasions do

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things that no careful driver would be expected to anticipate does not mean that he is under a duty to anticipate such action. Everyone knows, for example, that on occasions, a driver may negligently cut in ; but it cannot surely be suggested that other drivers are under a duty to drive on the assumption that an approaching driver will negligently attempt to cut in. Everyone knows that on occasions a pedestrian will negligently step off the payment with his back to an oncoming motor car ; but it cannot surely be suggested that a driver is under a duty to drive on the assumption that a pedestrian will do so. And if one pedestrian why not a succession of pedestrians along the whole length of the street ? The truth is that if drivers were not entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, will behave with reasonable care, all traffic would come to a standstill since everyone at his peril would have to act on the hypothesis that his neighbour might at any moment put his own life in danger by behaving in a negligent manner.

As to the second proposition I do not appreciate its relevance. There was no question here of the driver behaving as though he was entitled to run the plaintiff down. On the contrary, he did what it was his duty to do, i.e., as soon as he saw the plaintiff he did everything possible to avoid hitting her.

As to the third proposition, the fact that if the driver had looked in that direction he would have seen the plaintiff is no ground for saying that it was his duty to look in that direction. The fact that a driver could have seen something if he had looked is, of course, conclusive against him when he was under a duty to look ; to say that he was under a duty to look because if he had looked he would have seen is, with respect, entirely to misunderstand the nature and foundation of the duty to keep a proper look-out.

For these reasons, and with all respect, I find myself unable to agree with the view of Humphreys J. Before us, however, an argument was presented which does not appear to have been put forward at the trial. It raised a suggested head of negligence which was not pleaded, but its introduction before us was not objected to. It was based on the language of reg. 3 of the Pedestrian Crossing Places (Traffic) Regulations, 1941, which provides as follows : " The driver of every vehicle " approaching a crossing shall, unless he can see that there is no " foot passenger thereon, proceed at such a speed as to be able " if necessary to stop before reaching such crossing."

No suggestion was made that the plaintiff was claiming damages on the basis that the driver had been guilty of breach of a statutory duty. It was said, however, that this regulation was effective to set up a standard of care to which the driver in the present case failed to conform. The argument was as follows: the regulation deals with both types of crossing namely controlled as well as uncontrolled crossings. Owing to the presence of the stationary taxicab the driver as he approached the crossing was unable to see that there was no foot passenger on the crossing. He was, therefore, bound to proceed at such a speed as to be able, if necessary, to stop before reaching the crossing.

As the question here is one of negligence and not of breach of an absolute statutory duty or of prosecution for an offence the regulation must be considered not in isolation but in relation to all the circumstances of the case. The alleged breach of the regulation is relied on as evidence of negligence and nothing more. Bearing this in mind I ask myself whether in the circumstances the driver is to be regarded as negligent for failing to assume that the plaintiff might be on the crossing hidden from view by the taxicab? I do not see how this can be so. If he was entitled to drive on the assumption that no pedestrian would disobey the light signal I do not see why he should be regarded as any more negligent because the taxicab was there than he would have been if it had not been there. The reasonable assumption which the driver was entitled to make was based on the warning given to pedestrians by the lights and that was precisely the same whether the taxicab was there or not. The argument appears to me to involve the proposition that the presence of the taxicab ought to have been assumed by the driver to make disobedience of the traffic signal by the plaintiff more likely than if the taxicab had not been there. I can see no reason for this.

There appears to me to be a further difficulty in the plaintiff's way. She stepped on to the crossing at the last minute. If there had been no taxicab there and the plaintiff had acted as she did act the driver could, I think, have said that the regulation did not require him to drive in such a way as to be able to stop before reaching the crossing. On the facts the omnibus had, I think, ceased to be an "approaching" vehicle. As was pointed out by this court in *Chisholm v. London Passenger Transport Board* (1), if the word "approaching" is to be con-

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strued as covering the passage of the oncoming vehicle right down to the moment when its front wheels reach the crossing the result will be absurd. If, at the moment when the plaintiff stepped on to the crossing, the omnibus would have ceased to be an "approaching" vehicle for the purpose of the regulation in the absence of the taxicab (as on the facts it would, in my opinion, have done) I cannot understand why it should have been any the more an "approaching" vehicle because the taxicab was there.

Lastly, on the assumption that the driver broke the regulation the question arises, was his breach the cause of the accident? There is, of course, no finding by Humphreys J. on this matter. But in my opinion the plaintiff does not discharge this burden. The evidence satisfies me that the accident would have happened in any event. The plaintiff in effect threw herself in front of the omnibus in disregard of the traffic signal and in reliance on a wild estimate of the speed of the omnibus. The accident would have happened whether or not the taxicab was there. The real cause of the accident, in my opinion, was the negligent act of the plaintiff herself. I would allow the appeal, but as my brethren take a different view the appeal will be dismissed. I should add that I do not share the view of Humphreys J. that the decisions of this court in the cases of *Bailey v. Geddes* (1) and *Chisholm v. London Passenger Transport Board* (2) are inconsistent with one another.

COHEN L.J. This is an appeal from a judgment of Humphreys J. given on February 25, 1947, awarding damages to the plaintiff in respect of injuries suffered by her in a collision with the defendants' omnibus which occurred on November 23, 1945. The learned judge assessed the damage suffered by the plaintiff at 500*l.*, but he only awarded her 250*l.*, holding that there was contributory negligence on her part and apportioning the negligence equally between the two parties. In this court the only issue was liability.

A number of facts in connexion with this action are not in dispute and I take them from a passage in the learned judge's judgment, which may be summarized as follows: "This action arises out of an accident which took place on November 23, 1945, where Baker Street is crossed by Blandford Street. The crossing from one side of Baker Street to the other is controlled by traffic lights. There is also a refuge in the

(1) [1938] 1 K. B. 156.

(2) [1939] 1 K. B. 426.

“ centre of the road, the nearest point of which is 17 ft. 9 ins.
 “ from the kerb, and there is a pedestrian crossing. The
 “ plaintiff was minded to cross Baker Street by way of the
 “ refuge, from the north-eastern corner to the north-western
 “ corner. As far as I can see, she walked in the middle of the
 “ pedestrian crossing. She safely negotiated something like
 “ 15 ft. of that 17 ft. 9 ins. and then she was knocked down and
 “ injured by the off-side front wing of one of the defendants’
 “ omnibuses which was coming south down Baker Street.
 “ There was a taxicab drawn up close to the kerb with its
 “ wheels actually on and blocking part of the pedestrian
 “ crossing. The evidence was that the taxi driver was off his
 “ seat, and was actually opening the door for a fare whom he
 “ had stopped to pick up. The effect was that the plaintiff’s
 “ view of the on-coming south-bound traffic in Baker Street,
 “ the traffic dangerous from her point of view, was masked by
 “ the width of the taxicab. I do not think it was given in
 “ evidence, but I suppose 5 ft. is a reasonable amount to
 “ assume as the width of the taxicab. In the same way the
 “ view which the omnibus driver would have of her when she
 “ was on the pedestrian crossing would also be masked
 “ 5 ft.”

Before us it was also agreed that the lights were in favour of the driver and that when the omnibus became stationary, its front wheels were actually on the crossing. These agreed facts are, in my opinion, sufficient to determine the dispute and I need not, therefore, consider the rest of the evidence.

The action was framed in negligence and as particulars of the negligence, the plaintiff alleged that the defendants their servants or agents (a) failed to give the plaintiff free and uninterrupted right of passage over the said recognized crossing ; (b) failed to keep a proper look-out ; (c) drove at an excessive speed ; (d) drove on the wrong portion of the road ; (e) failed to apply their brakes soon enough or at all ; (f) failed to give any or any adequate warning. No claim was made in respect of breach of statutory duty, but both in the court below and in this court, the plaintiff sought to rely as evidence of negligence on the alleged failure of the defendants’ driver to comply with certain of the provisions of the Pedestrian Crossing Places (Traffic Regulations), 1941, made under s. 18 of the Road Traffic Act, 1934. In my opinion she is entitled so to do. It seems to me that in considering whether a party has been negligent the court is entitled to have regard to what restrictions Parlia-

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ment has thought it necessary to impose on motor traffic for the protection of pedestrians whether the relevant provisions are to be found in an Act of Parliament or in regulations made thereunder. That was, I think, the view taken by this court in *Bailey v. Geddes* (1), where the claim was in negligence only, but this court decided in favour of the plaintiff on the ground that the cause of the accident was the failure of the driver to observe the regulations.

[His Lordship read regs. 2 to 5.] Regulation 6 is not material but I pause to remark that, on the evidence, it is plain that the driver of the taxi referred to by the learned judge committed a breach of it in stopping on the crossing.

It will be observed that para. (a) of the particulars of negligence reproduces part of the language of regs. 4 and 5, but I have come to the conclusion that she has failed to establish a breach of those regulations. Regulation 4 is irrelevant, since the crossing in question in this action was controlled by lights and the driver committed no breach of reg. 5, since according to the evidence he had received a signal (the green light) that he might proceed over the crossing before the plaintiff started to go over the crossing.

The position is different as regards reg. 3. This was not quoted or referred to in the pleadings but it was relied on without objection in the court below. It would have been better had the pleadings been amended when the point was raised, but I do not think we should be justified in refusing to allow the plaintiff to rely on it. On the evidence it is plain that at all material times the presence of the stationary taxi prevented the driver having an uninterrupted view of the whole of the crossing. That being so, it was impossible for him to see that there was no foot passenger thereon and it was therefore his duty under the regulation to proceed at such a speed as to be able, if necessary, to stop before reaching the crossing. On the driver's own evidence he saw the plaintiff when she was nine feet away from the omnibus and when he stopped the front wheels of the bus were on the crossing. Had he been driving at such a pace as to enable him to stop short of the crossing, it must, in my opinion, follow that he could have stopped within those nine feet.

Mr. Fox-Andrews however, advanced two arguments to rebut the suggestion that the driver's failure to comply with reg. 3 made his clients liable in negligence. First, he said the

(1) [1938] 1 K. B. 156.

regulation did not apply to crossings controlled by lights. He admitted that there was nothing in the regulation itself or in the definition in reg. 2 to exclude it, but he said that if it applied to crossings controlled by lights, reg. 5 was unnecessary. I am unable to accept this argument. Regulation 5 protects passengers on the crossing before the light goes green in the driver's favour, but the facts of this case indicate that reg. 5 may serve a useful purpose where the line of vision of driver and foot passenger is obstructed by something on the crossing. In this connexion it must be remembered that there is no regulation prohibiting foot passengers from traversing a road at crossings controlled by lights when the lights are green in favour of the drivers of vehicles. Scott L.J. said in *Chisholm v. London Passenger Transport Board* (1): "His (the pedestrian's) duty . . . is left to the common law; no penalty is imposed "on the pedestrian for embarrassing approaching vehicles." The contrast between the position of the driver of a vehicle who is prohibited under reg. 28 of the Traffic Signs (Size, Colour and Type) Provisional Regulations, 1935, from proceeding beyond the stop line on the carriageway when the red signal is on, and the position of a foot passenger is important in this respect. I am supported in the conclusion reached on this point by the observations of Slesser L.J. in *Wilkinson v. Chetham-Strode* (2), where the learned lord justice says: "It is apparent from the decision in *Bailey v. Geddes* (3) "that, quite apart from any consideration of light signals, the "obligation imposed on drivers by reg. 3 applies to all pedestrian "crossings controlled or not controlled."

Mr. Fox-Andrews' second argument was that even if reg. 3 applied, on the facts of this case the driver's failure to comply with reg. 3 did not constitute negligence. He relied on the learned judge's findings that (a) the driver had the lights in his favour and was proceeding at a reasonable pace and had his bus under perfect control; (b) the plaintiff proceeded against the lights although she had seen the omnibus. But finding (a) does not alter the fact that the driver failed to comply with reg. 3, and finding (b) only establishes contributory negligence.

Mr. Fox-Andrews relied on the decision of this court in *Chisholm v. London Passenger Transport Board* (1). In that case the court was considering reg. 4, not reg. 3, and explained its earlier decision in *Bailey v. Geddes* (3). MacKinnon L.J.

(1) [1939] 1 K. B. 426, 438.

(3) [1938] 1 K. B. 156.

(2) [1940] 2 K. B. 310, 321.

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said (1) : " The primary duty of a driver is to go at a reasonable speed. Let that be x miles an hour. And suppose at x miles an hour he can pull up in y feet. If he is going along at x miles an hour, and sees a pedestrian on a crossing ahead, he must, of course, slacken speed. But, if he sees no pedestrian on a crossing he is approaching, I think he can continue at x miles an hour. If, when he has got less than y feet from the crossing, a pedestrian enters it, he must, of course, do his best to pull up. But, as, ex hypothesi, he can only do so in y feet, he may be unable to avoid hitting him. In that case, I do not think he should be held to have broken the regulation. So to hold must mean that, going along the road at the proper speed of x miles an hour, every time he comes near to a crossing he must slow down almost to a walking pace, because of the possibility that some pedestrian may step into the road a few feet ahead of him. And this view of the regulation, besides being the common sense one, seems to me to recognize that there must also be a correlative duty of elementary care on the part of the pedestrians. Regulation 3 cannot have been intended to give pedestrians licence to be utterly reckless. If the car is coming along at the reasonable rate of x miles an hour, at which it can be stopped in y feet, for a pedestrian to walk in front of it when it is less than y feet from him, and he can plainly see it, is the acme of recklessness." But the court was not considering reg. 3 and it was the basis of its conclusion (see per MacKinnon L.J. (2)) that " the driver of the bus, when approaching the crossing, could and did see that there was no foot passenger thereon. And, so long as he could see that, the regulation imposed no duty upon him." In the present case he could not see whether there was anyone on the crossing ; therefore, he should have complied with reg. 3. It was said that if the taxi had not been there, he would have seen there was no-one on it at the material moment. But is not the answer to that argument that if the taxi had not been there, the plaintiff might not have misjudged her distance from the bus ? The taxi being where it was, it seems to me that both parties were negligent, the plaintiff for not proceeding with the caution demanded both by the colour of the lights and the presence of the taxi and the driver for disregarding the precautions required by the location of the taxi.

It was suggested in the course of the argument that so to hold

(1) [1939] 1 K. B. 426, 441. (2) Ibid. 441.

would be to paralyse traffic. I do not agree. My conclusion is based on the facts of this case including the fact that the taxi was stationary at a point where the law prohibits it stopping. I see no reason to assume that any undue inconvenience would be caused if the law requires that a driver approaching a vehicle in such a position should comply with regulations which have been imposed to prevent such a breach leading to an accident.

For these reasons (which are not the same as those given by the learned judge) I am of opinion that his decision was right and should be affirmed.

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ASQUITH L.J. Humphreys J. decided this case on the footing that the Pedestrian Crossings (Traffic) Regulations, 1941, should be ignored for all purposes and liability determined by exclusive reference to the common law as it would have operated if no such regulations had ever been made. If this had been the proper basis for determining liability I am of opinion, with great respect, that he ought to have arrived at a different conclusion, namely, that the driver of the bus was not negligent at all. At common law the driver of a motor vehicle is, of course, not entitled in all circumstances to assume that other users of the road will behave unimpeachably; but neither is he bound to anticipate and provide against every eccentricity and folly, however improbable, which they may elect to commit. For reasons given by my Lords, and which I will not repeat, I think the conduct of the plaintiff was consummately imprudent, and such as no bus driver could reasonably be expected to foresee in pursuance of his common law duty of care.

There remains, however, the complication raised by the existence of pedestrian crossing reg. 3. It seems to me, with all respect to the learned judge, plain that the existence of this and similar regulations cannot be wholly ignored for the purpose of determining civil liability. It is true that in this case breach of statutory duty is not pleaded as a separate cause of action. Nor was it so pleaded in *Bailey v. Geddes* (1), but that case, a decision binding on this court, proceeded on the footing (1.) that for the purposes of civil liability the common law duty is enhanced by the superaddition of the duty contained in the regulation, provided that duty is sufficiently pleaded, and (2.) that that duty is in fact sufficiently pleaded, if its substance is alleged as one of the particulars of the negligence relied on.

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There need not be a separate and independent averment of breach of statutory duty as such.

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In *Bailey v. Geddes* (1) the material regulation was No. 5, and its breach was pleaded as one of the particulars of negligence. In the present case the material regulation is No. 3; and its breach is not pleaded at all, either as a separate cause of action, or as one of the particulars of the common law negligence alleged. Particulars of that negligence are in fact given and oddly enough among them is the substance of reg. 4, which is, on the facts of this case, irrelevant. If the material regulation or its substance had been pleaded I personally should have felt bound for the reasons given by Cohen L.J. to hold that the driver had acted in breach of it, and that such breach had been a contributory cause of the accident. And, as the case has been argued both below and here on the footing that the point was open to the plaintiff, I think the pleading should be treated as having been amended and the appeal dismissed.

Appeal dismissed.

Solicitor for defendants: *A. H. Grainger.*

Solicitors for plaintiffs: *Bryan O'Connor & Co.*

(1) [1938] 1 K. B. 156.

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CRATE v. MILLER.

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Apr. 28;
May 16.Somervell and
Evershed L.JJ.
and
Wynn-Parry J.

Landlord and tenant—Weekly tenancy beginning on Saturday—Notice to quit on Friday—Construction—Validity.

A weekly tenancy which begins on a Saturday may be determined validly by the landlord's giving either a notice to quit on Friday or a notice to quit on Saturday: in either case the notice is properly construed as a notice to the tenant to quit when the current week ends; for a notice to the tenant to quit on the last day of the current period and a notice to him to quit on the day after that day are both equally intimations that the last day of the current period is to be the last day of the tenancy.

The expression "Saturday to Saturday tenancy" is not apt to describe a weekly tenancy beginning on a Saturday: such a tenancy expires at midnight on Friday, so that the immediately succeeding Saturday is in fact the first day of a new week.

Quære, whether a notice terminating a weekly tenancy beginning on a Saturday, "on Friday . . . or at the end of the next

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

"complete week of your tenancy from the date hereof" is invalid as not making it certain on which day the landlord claims to re-enter.

Queen's Club Garden Estates, Ltd. v. Bignell [1924] 1 K. B. 117 approved, but dictum of Salter J., at p. 133, disapproved..

Sidebotham v. Holland [1895] 1 Q. B. 378 applied.

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APPEAL from Lambeth county court.

The plaintiff let furnished premises to the defendant on a weekly tenancy, beginning on a Saturday. The premises being furnished, no question arose under the Rent Restriction Acts. A notice to quit dated July 5, 1946, in the following terms was sent to the tenant: "To Mr. Percy Miller, 67 Kensington Oval, S.E.11. As solicitors for your landlord, Mrs. Crate, of the furnished room occupied by you and being let to you together with board at 11. 15s. 0d. per week, we hereby give you notice that the landlord will terminate your tenancy on Friday, July 19, 1946, or at the end of the next complete week of your tenancy from the date hereof on which date you are hereby required to quit and deliver up possession." The county court judge made an order for possession, and the tenant now appealed.

The tenant appeared in person.

The landlord did not appear.

SOMERVELL L.J. [delivering the judgment of the court:] It was argued in the court below, as appears from the judge's note, that the notice to quit given by the landlord was invalid in that it expired on a Friday instead of on a Saturday. This point was argued by the tenant before us, with other points to be referred to later.

The judge found that the tenancy was a weekly one beginning on a Saturday, which he described as a "Saturday to Saturday tenancy." There was clear evidence on which he could so find. He referred in his judgment to *Sidebotham v. Holland* (1), a decision of this court, which concerned a yearly tenancy beginning on May 19. The question was whether a notice to quit and deliver up possession on May 19, being an anniversary of the day on which the tenancy began, was good. It seems to us clear that all the members of the Court were of opinion that a notice to quit on the 18th would have been a good notice. A. L. Smith L.J. doubted whether the notice to quit on the

(1) [1895] 1 Q. B. 378.

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19th was a good notice, because, as he said (1) : " It is not " a notice expiring upon the last day of the year of the tenancy, " but upon the day after." The majority of the court decided that it was a good notice, and we will quote one sentence from their judgment, delivered by Lindley L.J. (2) : " But, although " a half year's notice to quit on the 18th would be correct, it " does not follow that a notice to quit on the 19th, which is " the anniversary of the day on which the tenancy commenced, " is bad, and I am clearly of the opinion that it is not." In support of this view a number of authorities were considered. As we read that decision, it is based on the view, first, that, on the dates in question there, the tenant had to quit and deliver up possession by midnight at the end of May 18 ; and, secondly that a notice to quit and deliver up possession either on the 18th or on the 19th could be construed as a notice to quit at that moment of time constituting the end of the period, in that case a year, which began on the previous 19th of May. Lindley L.J. continued : " A notice to quit at the first moment of the " anniversary ought to be just as good as a notice to quit on " the last moment of the day before." In other words, a notice to quit on either day could be construed as a notice to quit when the current period in question ended. As a matter of language, a notice " terminating a tenancy " on the last day of a current period (which was the form used in the present case) may, apart from *Sidebotham v. Holland* (3), fairly be said to mean the same thing as a notice to quit and deliver up possession on the following day ; for in both cases the landlord is intimating that the last day of the current period is to be the last day of the tenancy.

In *Queen's Club Gardens Estates, Ltd. v. Bignell* (4), the question of weekly tenancies was considered by a Divisional Court, and the principles applicable were stated very fully by Lush J. He held, and Salter J. agreed with him, that in all cases of periodical tenancy, whether yearly, quarterly, monthly or weekly, the same principle is to be applied and a valid notice to quit must be expressed so as to terminate the tenancy at the end of the current period. In our view this is right, and *Sidebotham v. Holland* (3) therefore applies to the present case, and was rightly accepted by the county court judge as authority for the view that the notice given by the landlord was effectual to terminate the tenancy.

We would like to add that the expression " Saturday to

(1) [1895] 1 Q. B. 387.

(3) Ibid. 378.

(2) Ibid. 383.

(4) [1924] 1 K. B. 117.

"Saturday tenancy," which was used by the county court judge in this case and by Salter J., in the Divisional Court (1) is, or may be, misleading. If a tenancy for a week begins on a Saturday it expires at midnight on the following Friday. We think that Salter J. was wrong when he treated the Monday as the second of the seven days forming a current week of the tenancy. If a tenancy begins on a Saturday, we think that Monday is the third of the seven days forming a current week.

The present notice to quit, as will be seen, contains an alternative. Presumably this was inserted on grounds which are referred to by A. L. Smith L.J. in *Sidebotham v. Holland* (2). He there says that the plaintiff would have avoided the difficulties which had arisen if he had "added the words which 'are very ordinarily inserted in a notice to quit, 'or at the 'expiration of the year of your tenancy, which shall expire 'next after the end of one half-year from the service of 'this notice.''" It will be seen that in the present notice the alternative purports to run from the date of the notice and not of its service, which was in fact three days later, so that if the landlord had had to rely upon the alternative the length of the notice would have been insufficient. In the course of the argument the court felt that a possible point might have been taken with regard to this alternative, and also, possibly, with regard to the validity of the use of this suggested alternative form, which may be said to leave it in doubt on which day the landlord claimed to re-enter. There is, however, no suggestion in the judge's note that any such point was taken below, and it did not seem to us, therefore, open to the court to consider it on the present appeal. In saying this, we do not desire to be thought to be expressing any opinion one way or the other on either point.

The tenant sought also to raise before us an alleged irregularity in the service of the summons. This point also was not taken below, and it would seem in any event to have been waived by the proceedings before the county court judge.

The tenant finally sought to take a point based on what he said were inaccurate dates in the Particulars of Claim, but these do not seem to affect the issue.

The appeal will be dismissed, with costs. There will be an order for possession in three weeks.

Appeal dismissed.

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(1) [1924] 1 K. B. 133.

(2) [1895] 1 Q. B. 389.

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Lord Goddard
C.J.,
Atkinson and
Oliver JJ.

WILTSHIRE COUNTY VALUATION COMMITTEE v.
BOYCE.

WILTSHIRE COUNTY VALUATION COMMITTEE v.
MARLBOROUGH AND RAMSBURY RATING
AUTHORITY AND ORCHARD.

Rating—Exemptions—Lands exempted by private Inclosure Act from “all parochial taxes and duties”—No scheme made—Exemption from general rate—Land let on 999 years lease—“Belongs” to freeholder—Stat. 17 Geo. 3, c. cxxv.—Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), s. 2, s. 64, sub-ss. 1 and 2.

By a private Inclosure Act of 1777, all lands within the parish of R. “which shall belong to the vicarage of the same parish” shall . . . be and for ever remain free from and discharged “of all parochial taxes and duties whatsoever,” subject to certain conditions. In 1946 a proposal was made to include in the valuation list for the rating area concerned two hereditaments, (1.) a house which formed part of the ancient estates of the vicarage of R. and was let on a weekly tenancy, and (2.) a council house built on land which was awarded to the vicar of R. under the Act of 1777 and had been demised to the local rural district council on a 999 years lease. It was admitted that the conditions referred to in the Act of 1777 were satisfied and that no scheme had been made concerning the land in question under s. 64 of the Rating and Valuation Act, 1925 :—

Held, that since the general rate under the Act of 1925 merely replaced the poor rate, which was equivalent to parochial taxes and duties and included all rates usually levied therewith, and since no scheme had been made under s. 64 of that Act, the exemption conferred by the Act of 1777 continued to apply to the hereditaments in question and those hereditaments were consequently not liable to the general rate.

Associated Newspapers, Ltd. v. City of London Corporation [1916] 2 A. C. 429, applied.

Held, also, that the land let on a 999 years lease still “belonged” to the vicar within the meaning of the Act of 1777.

CASE STATED pursuant to s. 11 of the Quarter Sessions Act, 1849.

The appellants, the Wiltshire Valuation Committee, made proposals for the amendment of the valuation list for the rating area of the Marlborough and Ramsbury Rural District in reference to certain hereditaments in the parish of Ramsbury owned as to the fee simple by the vicar of that parish and in the occupation of the respondents Miss Boyce and Mr. Orchard, with a view to the inclusion of those hereditaments in the

valuation list. At a meeting on March 6, 1946, the assessment committee for the area concerned, having heard the proposals, determined to make no alterations or additions to the valuation list. The appellants gave notice of appeal to quarter sessions and by consent of the parties, and by order of Lynskey J., the following special case was stated for the opinion of the High Court.

The hereditament in the occupation of the respondent, Miss Boyce, was let to her on a weekly tenancy. The hereditament occupied by the respondent, Mr. Orchard, was a council house erected by the local rural district council on lands demised to the council for terms of nine hundred and ninety-nine years at annual rents totalling 26*l.* by two leases, dated February 28, 1934, and September 29, 1938, respectively, and made between the Vicar of Ramsbury of the first part, the Ecclesiastical Commissioners of the second part, the patron of the benefice of the third part and the council of the fourth part. The hereditament occupied by the respondent, Miss Boyce, formed part of the ancient estates of the vicar of the parish of Ramsbury. The hereditament occupied by the respondent, Mr. Orchard, formed part of lands awarded to the vicar of Ramsbury by an award made under a private Act of Parliament (17 Geo. 3, c. cxxv), known as the Ramsbury Inclosure Act, 1777. That Act provided, *inter alia*: "That all the lands, tenements, " tythes, hereditaments, rights and properties, within the parish " of Ramsbury aforesaid, which shall belong to the vicarage of " the same parish, shall from and immediately after the date " and execution of the award of the said commissioners " be and for ever remain free from and discharged of all paro- " chial taxes and duties whatsoever, so long as the vicar of the " parish for the time being shall do and perform all the offices " of the church as vicar, for the poor of the said parish who shall " receive alms, without fee or reward, and no longer." An award under that Act relating to the lands in question was made and executed on September 18, 1778, and the hereditaments in question in the case had been exempted from rates ever since.

It was agreed (1.) that the vicar of Ramsbury still performed the offices of the church as vicar for the poor of the parish who should receive alms, without fee or reward, in accordance with the Act; (2.) that no scheme had been made or approved pursuant to s. 64 of the Rating and Valuation Act, 1925; and (3.) that subject to the determination of the question raised in the case the respondents, Miss Boyce and Mr. Orchard, were in

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rateable occupation of the hereditaments in question.

The appellants contended (1.) that, in consequence of s. 2 of the Rating and Valuation Act, 1925 (1), the provisions of the Ramsbury Inclosure Act, 1777, exempting certain land from parochial taxes and duties no longer applied; (2.) that in the absence of a scheme under s. 64 of the Act of 1925, those provisions could not apply; (3.) that the exemption (if in existence) could only apply to land in the occupation of the Vicar of Ramsbury; and (4.) that any such exemption could only apply to such part of the rate as could properly be described as a parochial tax or duty.

The respondents contended (1.) that the hereditaments were exempt from payment of rates by virtue of the Ramsbury Inclosure Act, 1777; and (2.) that such exemption was continued by s. 64, sub-s. 1 (b), of the Rating and Valuation Act, 1925.

The question for the court was whether the exemption from parochial taxes and duties conferred by the Ramsbury Inclosure Act, 1777, in respect of the lands belonging to the vicarage of the parish operated to exempt such lands from the general rate leviable under the Rating and Valuation Act, 1925.

Harold Williams for the appellants. The exemption conferred by the Act of 1777 extends only to parochial taxes and duties and not beyond that. The general rate made under the Rating and Valuation Act, 1925, was a new charge, not in any sense a parochial charge. Such an exemption should, therefore, be held to have gone altogether, except in cases where an exemption has been continued under s. 64 of the Act of 1925

(1) Rating and Valuation Act, 1925, s. 2, sub-s. 2: "As from the appointed day the rating authority of each rural rating area shall, in lieu of making a poor rate for each parish, make and levy a general rate for the whole of the district."

Section 64, sub-s. 1: "Subject as otherwise expressly provided in this Act, nothing therein contained shall affect . . . (b) any exemption from or privilege in respect of rating conferred by any local Act . . ."

Section 64, sub-s. 2: "For the

"purpose of securing the continued operation, notwithstanding the passing of this Act, of any such privilege or exemption as aforesaid—(a) the rating authority . . . shall, before the appointed day, submit to the Minister a Scheme making provision . . . for the purpose aforesaid; (b) if no such Scheme is submitted by the rating authority before the appointed day, the Minister may himself make a Scheme for the purpose aforesaid."

and a scheme has been made under that section for that purpose. Here, no scheme has been made. A statutory provision conferring an exemption does not necessarily exempt from future rates and taxes: see *Associated Newspapers, Ltd. v. City of London Corporation* (1), where Lord Haldane, referring to an observation of Bayley J. that an exemption from taxation might be considered analogous to a covenant to pay taxes, said: "I am unable to see how there can be any principle of un-
 "restricted application which determines the construction of
 "such a covenant. The question must, in each case, depend
 "on the meaning of the particular words used." That case overruled the decision in *Sion College v. London Corporation* (2), where it was held that an exemption from rates was confined to the rates which existed when the Act granting the exemption was passed. In the present case, since no scheme has been made, it should be held that the exemption granted by the Act of 1777 is no longer applicable so as to exempt from the general rate. As to the ownership of the hereditaments in question, the house which was built on land leased to the council for nine hundred and ninety-nine years cannot be said to belong to the vicar within the meaning of the Act of 1777, and therefore the exemption should not in any event apply to that property.

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Blanco White K.C. and *McGougan* for the respondents, the Marlborough and Ramsbury Rating Authority and Orchard. There are two separate questions (i.) whether the exemption given by the Act of 1777 still continues; and (ii.) whether that exemption covers the two properties which are the subject-matter of this case. As to the first question, the only local tax levied before the Rating and Valuation Act, 1925, was the parish tax, or poor rate. There was a county rate, but that was levied as part of the poor rate: see *The Queen v. Aylesbury Overseers* (3). The poor rate, although it included the county rate, was one and indivisible: *City of London Corporation v. Associated Newspapers, Ltd.* (4). Therefore, an exemption granted as to the poor rate confers an exemption from all rates levied with the poor rate and, therefore, from the general rate under the Act of 1925 which has taken the place of those rates. As to the second question, lands which have been let by the vicar must be included in the words "lands belonging to the vicarage," since the freehold remains in him. The lands were

(1) [1916] 2 A. C. 429, 439.

(3) (1846) 9 Q. B. 261.

(2) [1901] 1 K. B. 617.

(4) [1915] A. C. 674.

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clearly given to the vicar in order to provide him with an income and it must have been contemplated that they would be let.

Gilbert Dare for the respondent Boyce.

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LORD GODDARD C.J. The question raised in this case is whether by virtue of the Rating and Valuation Act, 1925, a certain exemption from rating, which applied to lands belonging to the vicarage of Ramsbury, has ceased to be effective, so that lands are now liable to be rated.

In 1777, at the time when the inclosure of open lands and common lands was a common feature in England, certain lands which were liable to tithes in favour of the incumbent of Ramsbury were inclosed under a private act, 17 Geo. 3, c. cxxv, which provided that all such lands belonging to the vicarage of Ramsbury should be exempted from all parochial taxes and duties whatsoever, subject to the performance of certain offices by the vicar. Under the Rating and Valuation Act, 1925 it was provided by s. 2, sub-s. 2, that so far as rural districts were concerned, that the rating authority of each rural rating area should, in lieu of making a poor rate for each parish, make and levy a general rate for the whole of the district. It is well-known that before that Act, in deciding the amount of the poor rate, many other matters had to be taken into account as well as the amount required merely for the relief of the poor. In modern times the expenses of the old boards of guardians, who were responsible for the relief of the poor, have been very often quite a minor part of the poor rate. Such things as the education rate, and so forth, were all levied as part of the poor rate by reason of the introduction of the county rate under which the county authorities issued a precept to the overseers of the poor in any parish, showing how much they required from that parish as a contribution to the general county expenses. The general county expenses included such matters as main roads, police, prosecution of offenders and various other county purposes. But it is clear that from quite an early time, although the poor rate might be levied to raise a sum of money which would be applied to these various other matters, it none the less remained a poor rate. That was decided in *Queen v. Aylesbury Overseers* (1).

But I think that, from the point of view of this court, the matter is put beyond controversy by the decision of the House of Lords in *Associated Newspapers, Ltd. v. Corporation of the City of London* (1), where it was decided that where a private Act had given exemption in respect of certain lands, it conferred exemption from any further rates which were levied in respect of that land and collected as part of the general rate, and the fact that there was a new class of rate which was not in existence at the date when the exempting Act was passed was not to be considered. It seems, therefore, on those authorities that an exemption granted from parochial rates will confer exemption in respect of any rates which are levied together with and as part of the ordinary poor rate. The effect of the Rating and Valuation Act, 1925, is that it is no longer called a poor rate, but a general rate. It seems to me it is a mere change of name, because in the general rate you include all the matters which were formerly dealt with in the poor rate. In s. 2, sub-s. 3 (a), of that Act it is provided: "In the case of any general rate made in a rural rating area in respect of any period before the date of the first new valuation, the rating authority shall, notwithstanding anything in this sub-section, give effect in the collection of the rate to any exemption or abatement to which any person would have been entitled in respect of any hereditament if the rate had been a poor rate." That obviously is a temporary provision made in respect of the first new valuation to be made under the Act; and it looks as though Parliament in making that proviso contemplated some further action in the future, and such further action is, no doubt, that which is contained in s. 64. It is not necessary to speculate on what a scheme under that section could contain. It may well be that a scheme could provide that the exemption granted by an Act should not extend to the full amount of the general rate in view of the varied and new matters with which the general rate might be made to deal. It may be a scheme could provide that the exemption should only continue so far as it had applied before the Act came into force, or even, I suppose, at an earlier date than the time when the exempting Act was passed. But, in fact, in this case—and this is the reason why this case comes before the court—no scheme has ever been made—either by the rating authority or by the Minister, and it seems to follow from that that the exemption

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must continue. The exemption has been given by an Act of Parliament, and it has never been altered. As I have already said, the general rate now made only takes the place of the poor rate which previously existed, and it is shown that, the poor rate being one and indivisible, as was said in the House of Lords, it makes no difference for what purpose that rate was made or what sums were included therein. They were all part of the poor rate.

One consideration which appeals to me personally in this matter is that it was possible for the rating authority to prepare a scheme. It was not possible for the rated occupiers to prepare a scheme. If, therefore, there is no scheme prepared, it would be in the highest degree unjust to take away the exemption because a scheme had not been prepared and submitted by the only people who could submit it, or by the Minister on whom a statutory duty was placed but who has not performed that statutory duty. I think, therefore, that until a scheme is made and submitted, the exemption given by the Act applies and the lands remain exempted from the general rate.

One other point has been argued. So far as one of the hereditaments in this case is concerned, the Old Vicarage at Ramsbury, which is occupied by a Miss Boyce, there is no question that that was part of the ancient glebe of the benefice, and it still belongs to the vicar and churchwardens and is leased on a short lease. But with regard to the other land, which, by virtue of the award, became the property of the vicarage, to use the word used in the Inclosure Act, which, of course, in strictness, means the vicar and churchwardens, that land has been let on a nine hundred and ninety-nine years' lease to the rural district council, and we are invited to say whether, in those circumstances, the land still belongs to the vicarage. I think it clearly does. In my view, the word "belong" in this case must indicate the person who has the legal title to the land as freeholder, and the vicar and churchwardens undoubtedly have that. There are reversions vested in them. On breaches of covenant or failure to pay the rent they would be the proper plaintiffs; and notwithstanding that the lease is for nine hundred and ninety-nine years, they would be entitled to the remedies which are given to them, and I find it impossible to hold, merely because there is a leasehold interest imposed on the freehold interest, that that prevents the land from belonging to the vicarage. It may be that if this sort of point had been

visualized, some provision would have been made in the Act about these very long leases, but as it has not been, I think the court is bound to give effect to the plain words of the Act and hold that both these hereditaments belong to the vicarage and are exempt from rating, and the question put to the court must be answered in that sense.

ATKINSON J. I agree. The question asked is whether the exemption from parochial taxes and duties conferred by the Ramsbury Inclosure Act, 1777, in respect of the lands belonging to the vicarage of the parish operates to exempt such lands from rates levied by virtue of the Rating and Valuation Act, 1925, and in particular from the general rate. The argument is that the general rate quite clearly includes something more than a parochial rate, namely, the county rate, and that the words of the exemption were merely "free from and discharged of all "parochial taxes and duties whatsoever." It was argued that merely because there was an exemption from the poor rate, or the purely parochial rate, you cannot extend that so as to include an exemption from the county rate. The answer to that, I think, is provided in *Queen v. Aylesbury Overseers* (1), in the two opening lines of Lord Denman's judgment: "The "poor rate is the fund which raises, in the different parishes, "the county rate." That means that the county rate was always raised by being included in the poor rate and was, in fact, part of the poor rate. Therefore, if a person were exempted from the poor rate, he was also automatically exempted from that part of it which might be spent on county purposes. Lord Parker, in *City of London Corporation v. Associated Newspapers, Ltd.* (2) said: "It is true that the moneys now "leviable by means of such rate"—that is the poor rate—"are applied for a variety of statutory purposes, but the rate "remains the same." That explains s. 2, sub-s. 1, of the Rating and Valuation Act, 1925, which says: "As from the "date of the first new valuation, the rating authority of "each urban rating area, in lieu of the poor rate and any other "rate which they have power to make, shall make and levy for "their area a consolidated rate which shall be termed 'the "'general rate','" obviously treating the general rate as co-extensive with the poor rate and including any other parochial rate. That seems to me the answer to the question, and, there-

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(1) 9 Q. B. 261, 269.

(2) [1915] A. C. 674, 697.

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fore, exemption from the poor rate covers the general rate that is levied to-day.

OLIVER J. I agree and cannot usefully add anything.

Solicitors for appellants : *Radcliffes & Co., for P. A. Selborne Stringer, Clerk to Wiltshire county council.*

Solicitors for respondent Boyce : *Wallace, Pyman & Co., for Phelps & Lawrence, Ramsbury.*

Solicitors for rating authority and respondent Orchard : *Ernest Bevir & Son, for H. Bevir & Son, Wootton Bassett.*

H. A. P.

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Atkinson and
Oliver JJ.

Rating—Industrial hereditament—Egg packing station—"Adapting for sale"—Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149, sub-s. 1—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5, c. 44), s. 3, sub-ss. 1, 2.

Premises described as an egg packing station, at which eggs collected from the neighbouring district are cleaned, graded, stamped and packed ready for distribution to wholesalers, are premises used for the purpose of adapting articles for sale and are therefore an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928.

Kaye v. Burrows [1931] A.C. 477, applied.

SPECIAL CASE stated by the Recorder of Middlesbrough.

The respondents to the present appeal, A. Richardson & Son, appealed to quarter sessions at Middlesbrough from a decision of the Assessment Committee for the County Borough of Middlesbrough, dismissing a proposal for the amendment of the valuation list in respect of certain premises occupied by them as an egg packing station.

At the hearing on April 10, 1946, the following facts were proved or admitted. The respondents were the occupiers of a hereditament described as an egg packing station in the valu-

ation list and were assessed in the sums of 422*l.* and 348*l.* as the gross and rateable values respectively. On December 27, 1945, they made a proposal for the amendment of the list on the ground that the premises were an industrial hereditament. The proposal was dismissed and the respondents appealed. The respondents were authorized by a licence granted by the Minister of Food pursuant to the Eggs (Control and Prices) (Great Britain) Order, 1942, subject to certain conditions to buy and sell eggs as a licensed packer. The hereditament in question consisted of three floors of which part of the ground floor was let to another tradesman who was separately assessed. The remainder of the premises was in the occupation of the respondents, but the second floor was not used. On the ground floor there were an office and a space used for the storage of imported eggs and there were also kept there crates of graded home-produced eggs, eggs awaiting inspection, sorting and grading and two sorting, grading and grade-stamping machines. On the first floor there was carried out the work of repairing crates, making lids and sorting cartons for packing. Home-produced eggs were bought by the respondents on behalf of the Minister of Food and were collected from a wide district round Middlesbrough. The eggs were contained in various receptacles; many were in a dirty condition and they were always ungraded. From four to seven girls were employed in washing eggs. In all twenty-five persons were employed in the hereditament. After any necessary cleaning the eggs were "candled," i.e., held in front of a light and inspected. The eggs which passed that test were then passed through the grading machines. It was an offence to sell home-produced eggs which were not graded and stamped. The eggs were then re-crated according to grades, the crates being marked, secured and stacked to await distribution to wholesale egg merchants. The average weekly number of home-produced eggs brought in was about 8,000 dozen. Imported eggs were not all put through the same process. Samples were taken and, if there were any marked defects in any sample, the whole crate would be inspected as far as necessary. Any eggs which were thrown out for some reason, but which were not rotten, were manufactured into a substance called melange which was disposed of to confectioners.

The respondents contended that the hereditament was an industrial hereditament in that it was occupied and used as a factory or workshop and was not primarily occupied and used for the purposes set out in the proviso to sub-s. 1 of s. 3 of the

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Rating and Valuation (Apportionment) Act, 1928 (1), on the grounds that the crates of eggs dispatched from the hereditament were crates of graded, washed and saleable eggs different in bulk from the eggs conveyed into the hereditament which were mixed, unwashed and unsaleable eggs, and that such difference was an adaptation for sale.

It was contended for the assessment committee that the hereditament was not an industrial hereditament within the meaning of the Act of 1928 because it was primarily occupied and used for the purposes which were not those of a factory or workshop, on the grounds that the article, an egg, came into the hereditament as an egg, was separately examined to determine its character as an egg and that the article which left the hereditament was the same as that which entered it and no process of manufacture or adaptation for sale was carried on therein and that on the proved facts the hereditament was primarily occupied and used for the purposes of a distributive wholesale business or for storage or for a combination of such purposes.

(1) Rating and Valuation (Apportionment) Act, 1928, s. 3, sub-s. 1: "In this Act the expression 'industrial hereditament' means a hereditament occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or workshop: Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say (c) the purposes of a distributive wholesale business; (d) purposes of storage (f) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

Section 3, sub-s. 2: "For the purposes of this Act save as aforesaid, the expressions 'factory' and 'workshop' have

respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

Factory and Workshop Act, 1901, s. 149, sub-s. 1: "The expression 'non-textile factory' means any premises wherein any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes (iii.) the adapting for sale of any article, and wherein steam, water or other mechanical power is used in aid of the manufacturing process carried on there. The expression 'workshop' means any premises not being a factory, in which any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes (iii.) the adapting for sale of any article"

The recorder was of opinion that the hereditament ought, in law, to be treated as an industrial hereditament: he therefore allowed the appeal, but, at the request of the assessment committee and the rating authority, stated this case for the opinion of the High Court.

Harold Williams for the assessment committee and the rating authority. The question is whether these premises fall within the proviso to sub-s. 1 of s. 3 of the Rating and Valuation (Apportionment) Act, 1928. The parts of the premises which are used for factory purposes are only trifling. It is not the primary purpose of the premises to be a factory or workshop. The main part of the premises is used for sorting, grading and marking eggs. The only question is whether that is an adapting for sale within the meaning of the definition of "factory" in s. 149 of the Factory and Workshop Act, 1901. That question was discussed in the House of Lords in the course of a series of cases in which various industrial hereditaments were considered. In *Grove v. Lloyds British Testing Company, Ltd.* (1), Viscount Dunedin said: "I think 'adapting for sale' points clearly to something being done to the article in question which, in some way, makes it in itself a little different from what it was before." In that case it was held that premises in which the testing of cables was carried on were not an industrial hereditament. [He also referred to *Sedgwick v. Watney, Combe, Reid & Co.* (2) and *Kaye v. Burrows* (3).] It may be said in the present case that the respondents are not dealing with eggs as eggs, but with crates of eggs which by law require to be sorted before they can be sold. Nevertheless it is true to say that nothing is done on the respondents' premises which alters the nature of the article itself as an egg. The premises ought not, therefore, to be regarded as an industrial hereditament.

Michael Rowe K.C. and *Denis Robson* for the respondents were not called on.

LORD GODDARD C.J. The short point in this case is whether the premises in question had become a factory by reason of the fact that they were used for the adapting for sale of any article therein, there being steam, water or other mechanical power used in aid of the manufacturing process carried on there.

(1) [1931] A. C. 466, 467.

(3) [1931] A. C. 477.

(2) [1931] A. C. 461.

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I lay no particular stress on the fact that the crates in which the eggs are packed are made on the premises, because that is not the primary purpose for which the premises are used. Nor do I pay any attention, any more than the learned recorder did, to the fact that certain eggs which are thrown out for various reasons are made into a substance called melange, which is sent to confectioners. I base my judgment on the ground that there is a process of adapting for sale. These eggs have to be cleaned and then sorted into various grades. They are marked according to the grade, and then they are packed also according to the grade. The result of these processes is that the sorted results are sold, whereas the original bulk could not be sold, because it would be illegal to sell the eggs until these various processes, including that of grading, which was done by machinery, had been carried out.

In a number of cases which went to the House of Lords in 1931 soon after the Rating and Valuation (Apportionment) Act, 1928, had come into operation, a large number of industrial premises was considered, in all of which different processes were carried on. Of course, the circumstances differed according to the nature of the articles dealt with. One has to see if one can find in the judgments delivered in those various cases—one dealing with bottled beer, another with seeds, another with rags, another with cables, and so on—a principle enunciated which will govern other cases, although they may deal with other articles. The principle which I find laid down most clearly as governing this case is to be found in *Kaye v. Burrows* (1), which was heard and decided with *Hines v. Eastern Counties Farmers' Co-Operative Association, Ltd.* (1). That was a case where rags were sent into a building and there cleaned, sorted and baled. Scrutton L.J. in the Court of Appeal said (2): "The sorted results are sold, where the original "bulk could not be sold." That was approved by the House of Lords. They also approved the dissenting judgment of Lord Sands in *Easson's* case (3), in which he said: "On the counter "emptied out of collecting carts there is a huge amorphous "mass of waste paper, rags, etc., mixed with dirt and rubbish, "which no paper manufacturer would look at. The workers "produce a number of orderly bales in eighty different classes, "which the paper-makers readily buy for substantial sums." In the present case what is brought in is a great mass of eggs.

(1) [1931] A. C. 454, 456, 477.

(3) 1930 S. C. 480, 485.

(2) [1931] 1 K. B. 508.

collected from farmers all over the district. No purchaser would look at that mass of eggs because it would be illegal to buy them, just as it would be illegal for the respondents to sell the eggs until they had been graded, sorted, cleaned and marked; but when they have been arranged in orderly crates in their different classes—and there are at least five different classes—they can be, and are, readily sold. In my opinion, the case to which I have just referred entirely covers this case, and I agree with the learned recorder in thinking that it was a decision which bound him and which could not be distinguished in principle from the case which he had to consider. In my opinion, he came to the right determination in point of law, and this appeal fails.

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ATKINSON J. I agree. The question is whether the process carried on in this factory was one of the adapting for sale of any article. The article must not be regarded as an egg; what was, being dealt with were crates of eggs. It seems to me that the true test which clearly governs this case is put in *Grove v. Lloyd's British Testing Company, Ltd.* (1), the cable case, where Scrutton L.J. in the Court of Appeal said (2): "The cables . . . are, I think, not adapted for sale, but "tested to see if they are fit for sale," and the Lord Chief Justice in the Divisional Court said (3): "Their task is not to "adapt the cables for sale, but to see that they have been "so adapted." To put the test the other way round, in *Hines v. Eastern Counties Farmers' Co-Operative Association, Ltd.* (4), the seeds case, Scrutton L.J. is quoted with approval in the House of Lords, when he said: "In my view, there was both "alteration of substance and adapting for sale in sorting, "making a substantially different article in bulk from that which "existed before the processes were applied. In my opinion, "you cannot deal with the case by saying there was a seed "before the process and the same seed after the process. The "process has altered the bulk and made it"—that is, the bulk—"legally and commercially saleable." Again he is quoted with approval when he said, in the rag case: "The sorted "results are sold when the original bulk could not be sold." I cannot conceive of anything more applicable to this case than that, and I agree that the appeal fails.

(1) [1931] A. C. 450, 466.

(3) See [1931] A. C. 467.

(2) [1931] 1 K. B. 404, 515.

(4) [1931] A. C. 456, 477, 483.

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BROUGHBOROUGH
ASSESS-
MENT

COMMITTEE.

OLIVER J. I agree. If what the respondents did was not an adaptation for sale then language has no meaning.

Appeal dismissed.

Solicitors for assessment committee and rating authority :
Cunliffe & Airy, for Meek, Stubbs & Barnley, Middlesbrough.

Solicitors for respondents : *Herbert Smith & Co., for R. M. Beckwith, Middlesbrough.*

H. A. P.

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April 21 ;
May 8.

Morris J.

N. V. LEDEBOTER AND VAN DER HELD'S TEXTIEL-
HANDEL v. HIBBERT.

Bills of exchange—Dishonour—Damages—Interest—Payment of bill at maturity illegal—Holder an alien in enemy country—Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 47, sub-s. 1, s. 57, sub-ss. 1, 3.

The plaintiffs, a Dutch company carrying on business in Holland, drew a bill of exchange in Rotterdam on the defendant in 1932. The bill, which was payable on July 1, 1940, and contained no provision for the payment of interest, was accepted by the defendant generally. In May, 1940, Holland was occupied by the enemy and on July 1, 1940, payment was impossible and was also illegal by virtue of the Trading with the Enemy Act, 1939. The defendant did not pay the amount of the bill to the Custodian of Enemy Property in accordance with the Trading with the Enemy (Custodian) Order, 1939. Payment again became permissible in September, 1945, and in December, 1945, the defendant paid to the plaintiffs' agents the amount of the bill, but repudiated a claim for interest from July 1, 1940 :—

Held, that since payment of the bill at the date of maturity would have been illegal there was no breach of contract which would give rise to damages and the plaintiffs were not entitled to recover interest.

Biedermann v. Allhausen & Co. (1921) 37 T.L.R. 662, followed.

Held, also, that it made no difference that the defendant had failed to pay the amount of the bill to the Custodian.

ACTION.

The plaintiffs, a body corporate under the laws of Holland carrying on business in that country, drew a bill of exchange, dated October 19, 1932, in Rotterdam on the defendant, a British subject residing in England, for 1,216l. 16s. sterling payable on July 1, 1940, and the defendant accepted the bill generally. The bill contained no provision for interest.

In May, 1940, Holland was occupied by the enemy and remained in enemy occupation until May, 1945. The plaintiffs during that time were therefore "enemies" within the meaning of the Trading with the Enemy Act, 1939, and it was not possible or legal for the defendant to honour the bill. Under the Trading with the Enemy (Custodian) Order, 1939, it was the defendant's duty to pay the amount of the bill to the Custodian of Enemy Property, but he did not do so.

In September, 1945, when payment again became permissible, the bill was sent by the plaintiff's bank to the District Bank for collection and was presented by them, but was dishonoured. In the same month the plaintiffs' solicitors sent a letter to the defendant claiming payment of the amount of the bill with interest at 5 per cent. from July 1, 1940. On December 15, 1945, the defendant sent a cheque for 1,052*l.* in respect of the amount of the bill, less tax, but repudiated the claim for interest.

The plaintiffs now claimed 290*l.* 10*s.* 8*d.* as damages under s. 57 of the Bills of Exchange Act, 1882 (1), being 287*l.* 15*s.* 5*d.* interest at 5 per cent. from July, 1940, to the date of the writ (February 5, 1946), and 2*l.* 15*s.* 3*d.* in respect of protest charges and an amount underpaid as a result of a miscalculation. The latter amount was admitted by the defendant.

Ashworth for the plaintiffs. *Prima facie* the plaintiffs are entitled to interest from the date of dishonour of the bill: *Bank Polski v. K. J. Mulder & Company* (2). In the present case the bill was dishonoured on July 1, 1940, when payment was due and the defendant failed to pay. It is true that at that

(1) Bills of Exchange Act, 1882, s. 57, sub-s. 1: "Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows: (1) The holder may recover from any party liable on the bill . . . (a) the amount of the bill; (b) interest thereon . . . from the maturity of the bill."

Section 57, sub-s. 3: "Where by this Act interest may be recovered as damages, such interest may, if justice require

"it, be withheld wholly or in part . . ."

Section 47, sub-s. 1: "A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid."

Section 52, sub-s. 1: "Where a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable."

(2) [1942] 1 K. B. 497.

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date the plaintiffs had become "enemies" within the meaning of the Trading with the Enemy Act, 1939, and that it would have been illegal for the defendants to pay the plaintiffs direct. But the money due could have been paid to the Custodian of Enemy Property in accordance with the Trading with the Enemy (Custodian) Order, 1939. Instead the defendant kept and used the money and, as he had the use of the plaintiffs' money for five and a half years, it is only reasonable that he should pay interest on it. *Biedermann v. Allhausen & Co.* (1), in which it was held that interest was not recoverable on an unpaid bill which fell due during the war of 1914-1918, ought not to be followed. In any case the enactments then in force governing trading with the enemy were different from the Trading with the Enemy Act, 1939. The bill in the present case was not discharged by reason of the last-mentioned Act. The defendant remained liable on it, although it would have been illegal for him to pay it on maturity. If payment had been made to the custodian, the plaintiffs would at least have had security. [He also referred to *Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft Fur Carton-Nagen-Industrie* (2).]

John Foster for the defendant. Contracts which are executory when one party becomes an enemy alien are abrogated altogether. Applying that principle to bills of exchange, the result is that the amount payable under this bill was never really payable at all. Even if that is not so, at least payment must have been suspended. In any event interest is certainly not payable: *Biedermann v. Allhausen & Co.* (1). That case should be held still to be good law, since there is no material difference between the legislation in regard to trading with the enemy which was passed in 1914, and that passed in 1939. There is no authority for saying that a debt to an enemy alien becoming payable during a war is not suspended. It is true that the money might have been paid to the Custodian, but that would not have benefited the plaintiffs.

Even on the assumption that the contract revives at the end of the war, no interest would be payable, because there was no default and therefore no ground for damages.

Ashworth replied.

Cur. adv. vult.

May 8. MORRIS J. The question of main importance which

(1) (1921) 37 T. L. R. 662.

(2) [1918] A. C. 239.

arises in this case is whether in the events which happened the plaintiffs are entitled to claim and receive interest. The claim for interest is made pursuant to the provisions of s. 57 of the Bills of Exchange Act, 1882. The bill itself does not provide for the payment of interest, and s. 9, of the Act, therefore, does not apply. Under the Act, in my judgment, the present bill was dishonoured in July, 1940, when, presentment being excused by s. 52, sub-s. 1, the bill became overdue and was unpaid. Section 57 appears, therefore, *prima facie* to apply. The bill having been dishonoured, the section provides as the measure of damages that the holder may recover interest from the maturity of the bill. But, although the bill was dishonoured, the position was that the defendant would have been contravening the law and committing a criminal offence if he had paid the plaintiffs, assuming that he had been able to do so, by reason of the provisions of the Trading with the Enemy Act, 1939. In fact, the defendant did not pay the Custodian and took no step in regard to the bill or the money which he owed. No claim was made upon him by the State of the Netherlands as represented by the Royal Netherlands Government in London or by any government or any person on behalf of the plaintiffs.

In considering the claim for interest made in this action it is, in my judgment, necessary to bear in mind that it is a claim for damages for breach of contract. Section 57 of the Bills of Exchange Act, 1882, lays down what is the measure of damages to be applied in the normal case when a bill is dishonoured. In the present case, although the defendant did not perform his contractual obligation to meet the bill at maturity, he could not lawfully have done so. Apart from the position at common law, there was express statutory provision which prohibited him from paying the plaintiffs. In these circumstances, in my opinion, he is not liable in damages for having failed to pay. He was obliged not to pay. There seems to me to be something incongruous in asking the court to award damages against a man for failing to do what the law forbade him to do. This, in my view, disposes of the claim which is made. I do not consider that it is necessary to have recourse to sub-s. 3 of s. 57, of the Act, for, in my judgment, sub-s. 1 deals only with the ordinary normal case where dishonour inevitably involves an inexcusable failure to pay at the proper time. The use in the section of the word "damages" clearly connotes, and has regard to, a failure to pay which the courts would regard as

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without justification. If, however, contrary to my view, the wording of s. 57, sub-s. 1, ought to be read as conferring an automatic claim to damages in every case where a bill is dishonoured, then, in my judgment, it would be appropriate in the present case to invoke sub-s. 3, and to withhold interest. Justice would, I think, require the withholding of an award of damages in a case where the omission to pay the amount on a bill was obligatory and where the payment would have been unlawful.

The view was submitted on behalf of the defendant that, as payment of the bill to the plaintiffs was not lawful in July, 1940, the bill did not then become overdue, but in my judgment the bill did become overdue in the sense in which that word is used in the Bills of Exchange Act. I am not unmindful of the fact that the defendant was under obligation to pay the Custodian in 1940, and that he did not pay. This is, however, not a matter affecting the plaintiffs' right to claim interest, and the plaintiffs cannot assert or show that they have suffered damage by reason of the failure of the defendant to pay the Custodian, nor is their claim in the action advanced or founded on any such basis. The claim of the plaintiffs was submitted in reliance upon s. 57, sub-s. 1, and not upon s. 57, sub-s. 2, of the Bills of Exchange Act. If, alternatively, sub-s. 2 had been relied upon, the considerations that I express in this judgment would still have had applicability.

My attention was called to a passage in the judgment of Lord Greene M.R. in *Bank Polski v. K. J. Mulder & Company* (1): "There is one minor point raised by the defendants which relates to interest. By the judgment, interest was awarded as from November 1, 1939, which was the due date. In fact the bills were only presented to the plaintiffs for acceptance in February, 1940, and it is said that the judgment is wrong in that it ought to have allowed interest only from February, 1940, and not from November 1, 1939. No such point was taken before the learned judge and, in my opinion, there is no substance in it. The defendants have had the use of the money since November 1, 1939, and it appears to me that the judgment was perfectly right in awarding interest as from that date." In that case, however, the problem here presented did not arise and the judgments do not afford support for the submission made on behalf of the plaintiffs.

(1) [1942] 1 K. B. 497, 500.

In the course of the submissions made on behalf of the defendant it was urged that the true view might be that when the plaintiffs became enemies, though only in the technical and not in the ordinary sense, the obligation of the defendant became abrogated. This matter does not arise for decision, but in view of the nature of the obligation of the defendant and the circumstances relating to it, any contention to that effect would, in my view, having regard to the authoritative guidance afforded by the speeches in *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* (1), be most difficult to sustain; see also Sir Arnold McNair's "Legal Effects of War," pp. 119 to 121.

It was submitted by Mr. Ashworth on behalf of the plaintiffs that the defendant had had the use of the plaintiffs' money for five and a half years, and that it would be only reasonable that he should pay interest. It was further submitted that the defendant could have paid the Custodian, but, in my judgment, none of these considerations can result in deflecting inquiry from an issue whether damages for breach of contract ought to be awarded against the defendant. There is a distinction in principle, in my opinion, between cases where interest becomes payable by way of damages for non-payment, and cases where interest is payable by reason of express agreement. In reference to the former group Abbott C.J. said in *Du Belloix v. Lord Waterpark* (2): "But there is another objection to the plaintiff's recovering interest on the debt, for during the greatest part of that time he was an alien enemy, and could not have recovered even the principal in this country." I do not read the speeches in the House of Lords in *Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft Fur Carton-Nagen-Industrie* (3) as involving rejection of this view. Lord Finlay L.C. said: "This appears to me to follow from the principle that the property of an enemy is not confiscated, though his right to have it back is suspended during war. It was strenuously contended that in the case of a debt to a foreigner bearing interest no interest could accrue during the existence of hostilities between the countries of the debtor and creditor, and in support of this proposition two American cases were cited, *Hoare v. Allen* (4) and *Brown v. Hiatts* (5) the latter a decision of the Supreme Court of the United States. These decisions seem to me not to be in conformity with English law. The rule of international law on this point, in

(1) [1946] A. C. 219.

(4) (1889) 2 Dall. 102.

(2) (1822) 1 Dow. & Ry. 16, 19.

(5) (1872) 15 Wall. 177.

(3) [1918] A. C. 239, 245.

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" the view of the courts of this country, does not appear to have
 " formed the subject of any express decision in England. The
 " judgment of Lord Ellenborough, however, in *Wolff v.*
 " *Oxholm* (1) appears to me to imply that, in the view of
 " Lord Ellenborough, interest on such a debt would not cease
 " to run during the continuance of the war, but the point does
 " not appear to have been argued. It is difficult to see on
 " what principle the interest is to be forfeited if private property
 " is to be respected." It is to be observed that Lord Finlay
 is speaking of a debt bearing interest. In *Wolff v. Oxholm* (1),
 Lord Ellenborough was dealing with a case where in 1800,
 some years before the outbreak in 1807 of war between Great
 Britain and Denmark, a Danish subject was in debt to a
 partnership of British subjects in a specified sum for moneys
 advanced, which sum bore interest in this country. Lord
 Ellenborough's judgment was followed by Younger J. in
In re Fried Krupp Aktien-Gesellschaft (2), in which case interest
 was payable by a provision of German law which had the effect
 of making interest agreed interest. In the course of his
 judgment in that case, Younger J. said (3): " No objection
 " can of course be taken on principle to any German enactment
 " which would prohibit during the war any payment of money
 " by a German to any person resident or carrying on business in
 " enemy country, but the cancellation of all liability for
 " agreed interest during suspense of payment, and that for the
 " benefit of one party to the contract alone, stands on quite a
 " different footing. The German debtor has the use during the
 " period of suspension of the money he is prohibited from
 " paying, and it is difficult to find any just reason why he should
 " in these circumstances after the war be relieved of his con-
 " tractual liability to pay interest when he is not relieved of the
 " liability to repay the principal." In his speech in *Hugh*
Stevenson & Sons, Ltd. v. Aktiengesellschaft Fur Carton-Nagen-
Industrie, Lord Atkinson said (4): " Two American cases
 " and one English (*Du Belloix v. Lord Waterpark* (5)) were
 " cited going to establish that where the relation between the
 " parties is that of debtor and creditor interest does not accrue
 " to an alien enemy while he is an alien enemy. It is not very
 " easy to ascertain what precisely was the principle upon which
 " those decisions were based. As far as one can gather, how-

(1) (1817) 6 M. & S. 92.

(2) [1917] 2 Ch. 188.

(3) [1917] 2 Ch. 193.

(4) [1918] A. C. 255.

(5) 1 Dow. & Ry. 16, 19.

“ever, it appears to me to be this : that interest is in the nature of damages payable by the debtor by reason of his withholding his debt, his default in not paying his debt, and since during war he cannot lawfully pay his debt to an alien enemy without committing a crime, he is not in any default in omitting to pay it, and should not therefore be mulcted in damages for not doing what he cannot do lawfully. This doctrine has been extended to a case where the debt was due under a covenant by a mortgagor to pay interest on the mortgage money, presumably on the ground that, though the covenant was in form absolute and independent of the payment of the mortgage debt, it was impliedly conditional on default being made in payment of that debt. I do not think these decisions are consistent with the principle of the decision in *Wolff v. Oxholm* (1), in which, as I read the report, interest which accrued due during the war with Denmark was recovered, and besides I think they have not any application to the present case.” In the same case Lord Parmoor referred to the two American cases and proceeded (2) : “These cases have not, in my opinion, any direct bearing in this appeal, and I should require further research and investigation before accepting them as an authority that interest is not payable though there is a stipulation for its payment. In such a case it is difficult to see any difference in principle between the payment of interest and the payment of a capital sum. The case of *Du Belloix v. Lord Waterpark* (3) illustrates this point. This was an action on a promissory note which did not contain a stipulation for payment of interest. In the absence of such a stipulation the judge directed the jury that interest was damage for the detention of the debt, and that the question whether it should be allowed was peculiarly for their consideration. The jury found a verdict only for the principal sum named in the note. The court held that the jury had been rightly directed and that the question of interest was entirely for them. In the course of his judgment Abbott C.J. said”—Lord Parmoor then quotes what I have already read, and goes on : “In my opinion this dictum would not apply either to a case in which there is a stipulation for interest, or where there is a fiduciary relationship between the parties on the dissolution of a partnership.” Lord Parmoor does no more than say that

(1) 6 M. & S. 92.

(3) 1 Dow. & Ry. 16.

(2) [1918] A. C. 259.

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the words of Abbott C.J. are not applicable where there is a stipulation for interest or where there is a fiduciary relationship between the parties on the dissolution of a partnership.

The view which I have formed and expressed is in line with the judgment of Darling J., in *Biedermann v. Allhausen & Co.* (1). In that case bills of exchange which were accepted before the war, and became due after war was declared, were held by the drawer who was resident in Germany and who was an enemy within the meaning of the Trading with the Enemy Acts. After peace was declared the holder sued the acceptors and claimed interest from the dates when the bills respectively matured. It was held: "that as there was no breach of duty "in not paying the bills as long as the war continued, and as "payment did not become legal until the declaration of peace "with Germany on January 10, 1920, interest was only "recoverable from that date." The report of that case contains the following passage from the judgment of Darling J. (2): "It had been contended by the plaintiff that there "was a breach of duty to pay when the bills arrived at maturity, "and that from that moment the defendants became liable to "pay interest on the bills by way of damages. But the plain- "tiff was an alien living in an enemy country, and it would "have been impossible for the defendants to pay those bills in "either London or Leipzig. In his Lordship's view Mr. Bevan "was right when he contended that there was a suspension of "rights and liabilities, owing to the war, on those bills. There "was no breach of duty, therefore, on the part of the defen- "dants in not paying them on the dates fixed for payment, "and there could be no breach until January 10, 1920. Enough "had been paid into court in respect of the principals to satisfy "the duty, if that were the right conclusion. With regard to "interest it seemed that there could be no interest by way of "damages until the day had arrived when payment became "legal." It was submitted on behalf of the plaintiffs that the decision of Darling J. ought not now to be followed, and it was urged, alternatively, that the case depended upon the provisions of legislative enactments then in force relating to trading with the enemy which, it was submitted, differ from those passed in and after 1939. A reading of the enactments does not, however, suggest or reveal that any differences between those of the war of 1914-1918 and those of the second world war would alter the reasoning of Darling J. nor, in my judgment, is it shown that

(1) 37 T. L. R. 662.

(2) Ibid. 663.

such reasoning is out of tune with what has been laid down by the House of Lords in *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* (1). In my view, however, this present case falls to be decided upon a consideration of the provisions of the Bills of Exchange Act, 1882, and the Trading with the Enemy Act, 1939, and, for the reasons which I have given, the claim to be awarded interest by way of damages is not sustainable.

Solicitors for plaintiffs : *Slaughter & May*.

Solicitors for defendant : *Stibbard, Gibson & Co., for Bromley, Hyde & Robinson, Ashton-under-Lyne*.

(1) [1946] A. C. 219.

H. A. P.

Considered. REX v.
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[1949] 1 K. B. 686

Explained. R. v. PADDINGTON AND
ST. MARYLEBONE RENT TRIBUNAL.
[1949] 1 All E.R. 720.

REX v. HAMPSTEAD AND ST. PANCRAS FURNISHED HOUSES RENT TRIBUNAL. *Ex parte* ASCOT LODGE, LIMITED.

1947
May 8.

Lord Goddard
C.J.,
Atkinson and
Oliver JJ.

Landlord and tenant—Rent Control Court—Jurisdiction—Furnished houses—Flats—Landlord to be contractually entitled to payment for use of furniture or “services”—Evidence—Furniture, in fact, on premises, not mentioned in lease—Services provided by landlord’s porter, not mentioned in lease—Presumptions—Tribunal, no power to reduce rent for landlord’s breach of covenant—Furnished Houses (Rent Control) Act, 1946 (9 & 10 Geo. 6, c. 34), s. 2, sub-s. 1; s. 12, sub-ss. 1 and 2.

Where a tenant applies to a rent tribunal under s. 2, sub-s. 1, of the Furnished Houses (Rent Control) Act, 1946, for a reference to fix the rent of a house or part of a house, the tribunal has no jurisdiction to entertain the case, unless it appears that the landlord is contractually entitled to a payment for the use of furniture or “services” provided by him at the premises.

Where furniture, within the ordinary popular meaning of that word, is provided by the landlord on the premises demised, although there is no reference to that furniture, *eo nomine*, in the lease, it would (*semble*) presumably be furniture included in the demise, payment for use of which is included in the rent; but where attendance is in fact obtained by a tenant from a person employed by the landlord, such as a porter, for which there is no provision and to which there is no reference in the lease, there is no presumption that payment for the use of that service is included in the rent.

Per Curiam: A rent tribunal, when fixing a rent under the Furnished Houses (Rent Control) Act, 1946, can only fix the rent for the occupation of the premises and the use of furniture and

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services, if any. Having assessed that figure under the contract or contracts, they cannot reduce it on the ground that the landlord has not provided services to which the tenant is contractually entitled. For, in that case, a tribunal would be arrogating to itself a power, which it does not possess, to give damages for breach of covenant or contract and to assess the damages in a way which the law does not permit, by a reduction of rent on the ground of a breach of covenant or contract.

MOTION for an order of prohibition by Ascot Lodge, Ld., the owners of a block of flats, Ascot Lodge, Greville Place, London, to be directed to the members of the Rent Tribunal for Hampstead and St. Pancras and to Bertie Price of Flat 12 and to Bornch Mariel Moscovicz of Flat 12A, Ascot Lodge, prohibiting the tribunal from proceeding in purported pursuance of the provisions contained in the Furnished Houses (Rent Control) Act, 1946, to require from the applicants particulars relating to the letting by the applicants' predecessor in title to the said Bertie Price of Flat 12 and to David Sugar (whose lease was subsequently assigned to Bornch Mariel Moscovicz), of Flat 12A, Ascot Lodge, or from proceeding to enter into consideration of the references of their contracts, made to the tribunal, by Price and Moscovicz, to fix the rents thereof.

By a lease, dated September 20, 1946, Louis Scott demised Flat 12, Ascot Lodge, to Bertie Price for the term of fourteen years from September 29, 1946, determinable by the lessee at the expiration of seven years, at a rent of 240*l.* per year, subject to an increase in rent in the event of an increase in rates. By a lease, dated July 25, 1946, Louis Scott demised Flat 12A, Ascot Lodge to David Sugar for a similar term (but not so determinable by the lessee) at the same rent. Within a few days this lease was assigned to Bornch Mariel Moscovicz. The two leases, which were on printed forms, were similar in every respect. By cl. 4C, the landlord covenanted "to pay the "water rate and all rates charged on the said building (other "than charges for gas and electric current for which the lessee "is liable)" and, by cl. 4D "to light at all times the staircase "and landings of the said building and to keep the same cleaned "and swept." In the printed forms of the leases were originally provisions (1.) that the landlord would supply a constant service of hot water, and (2.) that the tenant should pay a portion of the basic charge for electricity. These two provisions were struck out. There was no provision in either lease for the supply of furniture or of porters or for the removal

of refuse. Louis Scott granted a lease of Ascot Lodge, dated March 3, 1947, for the term of ninety-nine years subject to, and with the benefit of, inter alia, the leases granted of Flats 12 and 12A, to Ascot Lodge, Ltd.

Price and Moscowicz by affidavit stated that in July, 1946, estate agents had represented to each of them that linen cupboards, electric cookers, special cork composition floors in the kitchen and bathroom, black and white tilings in the bathroom, ground floor lumber room for the use of tenants, and in the case of Price kitchen cupboards, and, in the case of Moscowicz, a refrigerator should be provided for their respective flats and that none of these had been provided. They also, by affidavit, stated that agents had represented that the service of a resident day and night porter would be provided and electric fires fitted in each room and an electric immersion heater, Price stating that the last item was until a boiler was available. The electric fires and electric immersion heater, they said, were provided. A day porter only was available between 8 a.m. and 4 p.m. who regularly cleaned and swept the stairways and entrance of the building ; kept the same lighted by a general switch ; removed from the flats in each case a dustbin provided by the landlord and returned the same to the flats, cleaned and emptied. The porter also carried out various other duties as were required by these two and other tenants of the building, such as carrying heavy parcels or trunks from the ground floor to the flats, moving the tenants' cars when necessary or desirable, carrying water up to the flats when, as a result of bad weather, the cold water supply in the flats became frozen and unusable. The landlord, they said, had fitted in the bathroom and kitchen special hermetically sealed light fittings and electric bulbs, a special removal double draining board to the kitchen sink, electric flex and lampholders, and a special dustbin for the kitchen. Both tenants stated that their flats suffered seriously from the condensation, being constantly damp, and that the electric fires and immersion heater did not work with full efficiency owing to the fact that no power circuit had been provided in the building.

Price and Moscowicz stated that, relying on these representations by agents, they had entered their flats and Price had executed the lease of Flat 12 and Moscowicz the assignment of the lease to him of Flat 12A. On March 3, 1947, they applied to the Rent Tribunal for Hampstead and St. Pancras for references to fix the rents payable under their contracts,

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for Flats 12 and 12A, Ascot Lodge. In each application the tenant stated that no furniture was provided by the lessor, apart from electric wall fires and that the services provided by the lessor were : (a) portorage, and (b) cleaning and lighting of staircase and removal of dustbins. The tribunal on March 10, 1947, called on Ascot Lodge, Ltd., to supply the tribunal with the prescribed particulars set out in the first schedule to the Furnished Houses (Rent Control) Regulations, 1946. Ascot Lodge, Ltd. replied that the two lettings did not come within the jurisdiction of the tribunal and that, unless they heard that the tribunal withdrew their demand for particulars, they would apply for an order of prohibition, and they sent the tribunal copies of the two leases of Flats 12 and 12A Ascot Lodge. The tribunal continued to demand a return of the particulars and stated that a date would be fixed for the hearing of the references. Ascot Lodge, Ltd. then obtained leave from the court to move for an order of prohibition.

Paul K.C., Percy Lamb and J. D. Purcell for applicants. To give the tribunal jurisdiction there must be a "contract" whereby a lessor grants to a lessee the "right" to occupy as a residence a house or part of a house in consideration of a rent, which includes payment for the use of furniture or for services. See s. 2, sub-s. 1, of the Furnished Houses (Rent Control) Act, 1946 (1). In the cases of Flats 12 and 12A Ascot Lodge, the contracts in question are the two leases to Price and Sugar (the latter subsequently assigned to Moscowicz), and, therefore, are in writing. There is no provision in these contracts that the rent shall include payment either for the use of furniture or for services. Neither the built-in electric fires, which have taken the place of coal fires, nor the electric immersion heater constituted furniture.

"Services" are defined in s. 12, sub-s. 1, of the Act (1) as

(1) By s. 2, sub-s. 1, of the Furnished Houses (Rent Control) Act, 1946: "Where a contract has, whether before or after the passing of this Act, been entered into whereby one person (hereinafter referred to as 'the lessor') grants to another person (hereinafter referred to as the 'lessee') the right to occupy as a residence a house or part of

" a house situated in a district in which this Act is in force in consideration of a rent which includes payment for the use of furniture or for services, whether or not, in the case of such a contract with regard to part of a house, the lessee is entitled, in addition to exclusive occupation thereof, to the use in common with any other

including : " attendance, the provision of heating or lighting, " the supply of hot water and any other privilege or facility " connected with the occupancy of a house, or part of a house, " not being a privilege or facility requisite for the purposes of " access, cold water supply or sanitary accommodation."

Clause 4D of the leases is a facility only for the purposes of access. There is no provision in these leases for " services " within the meaning of the definition. [Lord Goddard C.J. According to the evidence, the day porter at these flats in fact performs certain services for these tenants. Does not that raise the presumption that the rent includes payment for attendance ?]

No. A landlord may well allow his porter to perform certain services for his tenants, but may refuse to bind himself by contract to perform them by his servant, the porter. There can be no such presumption. As Henn-Collins J. said in *Property Holdings Co., Ltd. v. Mischeff*, in a passage of his judgment approved in the Court of Appeal (1) : " Taking next " the presence of the hall porters, the plaintiffs undertake to " use every precaution to employ no one but a competent and " trustworthy person as resident porter, but beyond that " their obligation does not go. Though the porter may, and " no doubt does, make himself obliging to the tenants, he has " no duty to perform for them, and I do not think that such

" person of other rooms or accom- " modation in the house, it shall " be lawful for either party to " the contract or for the local " authority to refer the contract " to the tribunal for the district ""

Provision is then made for the tribunal to call upon the lessor to provide certain information and to answer certain questions, and if he fails to do so, a penalty is provided under s. 9, sub-s. 2, for his failure.

By s. 12, sub-s. 1 : " In this " Act, unless the context other- " wise requires, the following " expressions have the meanings " hereby respectively assigned " to them, that is to say :— " ' services ' includes attendance, " the provision of heating or " lighting, the supply of hot water " and any other privilege or

" facility connected with the " occupancy of a house or part of " a house, not being a privilege " or facility requisite for the " purposes of access, cold water " supply or sanitary accommoda- " tion."

By sub-s. 2 : " Where separate " sums are payable by the lessee " of any premises to the lessor " for any two or more of the " following, namely :—(a) occu- " pation of the premises ; (b) use of " furniture ; and (c) services ; the " expression ' rent ' shall, in " relation to those premises, mean " the aggregate of those sums, " and where such sums are payable " under separate contracts, those " contracts shall be deemed to be " one contract."

(1) [1946] K. B. 645, 649.

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" attendance as he chooses to give can be said to be any part
 " of that for which the tenant pays his rent. Much the same
 " considerations apply to the removal of refuse. The receptacles
 " are in practice removed from the back doors of the flats by
 " someone employed by the plaintiffs to the point of collection by
 " the local authority, but this service is not stipulated for in the
 " lease and the tenant would have no valid ground of complaint
 " if he was left to make his own arrangements for this to be
 " done. I do not think 'attendance' can be extended to
 " anything to which the tenant is not contractually entitled."
 The judge was referring to proviso 1 to s. 12, sub-s. 2, of the
 Increase of Rent and Mortgage Interest (Restrictions) Act,
 1920, by which that Act was not to apply, save as otherwise
 expressly provided, to a dwelling-house bona fide let at a rent
 which includes payments in respect of board, attendance or use
 of furniture. Services or furniture so trifling in quantity or
 value as to be negligible, payment for the use of which was
 included in the rent, would not give the tribunal jurisdiction.
Wilkes v. Goodwin (1). Furniture need not be movable, but
 no one could suggest that built-in electric fires and an electric
 immersion heater were furniture in the ordinary popular
 meaning of the word : *Gray v. Fidler* (2).

C. L. Hawser for the tenants. Under the Furnished Houses
 (Rent Control) Act, 1946, as distinct from the Rent and
 Mortgage Interest Restrictions Acts, it is not necessary that
 the tenant should be contractually entitled to the services or
 furniture, if these are, in fact, provided by the landlord, and if
 it is clear that part of the rent is attributable to them. If it is
 necessary to show that tenant was contractually entitled to
 furniture or services the tenants here were so entitled under the
 terms of collateral agreements made with the landlords'
 agents upon the faith of which they executed their leases.

An electric panel fire is furniture. A portable electric fire
 can properly be regarded as furniture : see *Gray v. Fidler* per
 MacKinnon L.J. (3). In *Gray v. Fidler* the Court of Appeal
 decided that an article does not cease to be furniture because
 it is fixed to the premises. Therefore, the tribunal would be
 entitled to regard an electric panel fire as furniture and
 accordingly has jurisdiction. The provision of electric
 immersion heaters and panel fires is a " privilege or facility
 " connected with the occupancy of a house " and is, therefore,

(1) [1923] 2 K. B. 86.

(2) [1943] K. B. 694.

(3) *Ibid.* 700.

within the definition of "services" in s. 12, sub-s. 1, of the Furnished Houses (Rent Control) Act, 1946.

H. L. Parker for the tribunal. To give the tribunal jurisdiction the furniture or services must be supplied to the tenant by the landlord under a contractual obligation: see s. 2, sub-s. 1, of the Act of 1946, and *Property Holdings Co., Ltd. v. Mischeff* (1). But that contractual obligation may be express or implied. It is not sufficient to look only at the terms of a lease. See s. 12, sub-s. 2, of the Furnished Houses (Rent Control) Act, 1946, by which where separate sums are payable by the lessee of any premises to the lessor for any two or more of (a) occupation of the premises; (b) use of furniture; and (c) services, the expression "rent" in relation to the premises is to mean the aggregate of these sums, "and where such sums are payable under separate contracts, those contracts shall be deemed to be one contract." The tribunal, therefore, may have to consider contracts dealing with furniture or services, apart from the lease. The position under the Act of 1946 is very similar to that under s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, before the amendment contained in s. 10, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923. Any amount of furniture or services, payment for the use of which is included in the rent, will give the tribunal jurisdiction. Payment for the use of furniture, in fact, supplied by the landlord, though not mentioned in the lease, would be included in the rent. The definition of "services" in s. 12, sub-s. 1, of the Act of 1946, is in the widest terms, including "attendance, the provision of heating or lighting, the supply of hot water and any other privilege or facility connected with the occupancy of a house or part of a house, not being a privilege or facility requisite for the purposes of access, cold water supply or sanitary accommodation."

LORD GODDARD C.J. The ground upon which this motion for prohibition is moved is that the Rent Tribunal for Hampstead and St. Pancras has no jurisdiction to entertain the applications of Price and Moscovicz, the tenants of Flats 12 and 12A, Ascot Lodge, to the tribunal to fix the rents payable for those flats. This court has no concern with the policy of the Furnished Houses (Rent Control) Act, 1946: our sole task is to see whether the applications fall within the juris-

(1) [1946] K. B. 645.

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diction of the tribunal. If they do, the tribunal has power to hear and determine the applications, so long as, in hearing and determining them, they do not exceed their jurisdiction.

Probably the object of sub-s. 2, was to deal with the common case of service flats, where the tenants pay, very often, a considerable sum for the rent, and a separate sum for the services which the servants of the landlord render to them. No doubt, also, the provision was to prevent a landlord excluding a tenancy from the provisions of the Act, by inserting in his lease merely a sum for the rent of the flat or rooms unfurnished, and, having a separate agreement altogether for the furniture, the value of which he might assess at an extravagant figure.

The applicants contend that the tribunal has no jurisdiction to entertain the applications of their tenants for references to fix the rents of these two flats, because these were unfurnished lettings under which the landlord did not agree, to supply either furniture or services. To see whether that contention is correct we have to look at the leases. Each lease is in the same terms. The landlord lets the premises for a sum of 240*l.* ; there is not a word in the lease about furniture ; nor about the provision of porters. These leases were made in July and September, 1946, this Act having come into force in March, 1946. It is a matter of common knowledge that when an Act of this sort is passed, very often people conduct their business affairs in such a way as to secure that a transaction remains unaffected by the Act, and there is nothing wrong in their doing that. To take this case, the landlords do not covenant to provide porters or to provide hot water since, if they did, their tenants would obtain certain rights under the Furnished Houses (Rent Control) Act, 1946. The Act may not work out as favourably to all tenants as was expected, because, although there will always be jurisdiction in the case of furnished apartments, in the case of flats I expect there will be many landlords who will cease to agree to supply certain services, privileges, facilities and amenities which hitherto they have been accustomed to provide, that is, in new leases, they will take care not to undertake to provide them.

It may be that in the negotiations for these leases, the tenants were told that they could expect to find this, that, or the other facility. These leases are the contracts made between the parties, and the rents which are reserved by them are the rents for that which was demised, and for nothing else. There could

be no pretence here for alleging that the leases provide for services or for furniture, but, if in fact there was furniture on the premises, then, no doubt, if there was what would probably be called "furniture included in this demise," the Act would apply. Two points have been taken by the tenants: first it was said there was here come collateral agreement, but of this I can find no evidence whatever; there was no collateral contract. Secondly, it was said that, in fact, there was furniture demised. The landlord, after the negotiations, but before the execution of the leases, the leases being in printed form, struck out of the printed leases the covenant to provide a constant service of hot water and the covenant with regard to the proportion payable by the tenant for basic charges for electricity. When the flats were completed, instead of there being fireplaces, ordinary fireplaces, there was what is called panel heating, electric fires which became part of the wall of the flat. An electric fire which becomes part of a flat just in the same way as an ordinary coal fireplace, would be part of the building of the flat. There was also on the premises an electric immersion heater, and it is clear from the correspondence that the tenants before entering into the lease, were told that as hot water was no longer going to be supplied by the landlord, a part of the fittings in the premises would be an electric immersion heater. It was also made quite clear to the tenants that they would have to pay for electricity. I do not think anybody by any stretch of imagination could describe a panel electric fire, which, as I say, is just as much part of the structure as an ordinary fireplace, as furniture. If this electric fire is furniture, any fireplace is furniture. We have authority in the Court of Appeal in *Gray v. Fidler* (1)—and it is also common sense—that, in considering what is meant by the word "furniture," found in such statutes as the Rent Restriction Acts, we have to give to the word "furniture" its ordinary everyday meaning: those articles which an ordinary person would understand as being "furniture." I am sure no one would speak of an immersion heater or a panel fireplace as being furniture.

With regard to services, here again, we are told that there is on the premises a porter who does this, that and the other for the tenants. But it was decided in *Property Holdings Co., Ltd. v. Mischeff* (2), that for a purpose so similar to the present that there is no distinction to be drawn, "attendance" means attendance to which the tenant is contractually entitled.

(1) [1943] K. B. 694.

(2) [1946] K. B. 645.

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These two tenants were not contractually entitled to any services in this case. The simple test is this: if they go back to their flats this afternoon, and find there is no porter in attendance, the porter having discharged himself, or the landlord having discharged him and the landlord either not being willing or not being able to find another porter, where is the breach of contract on the part of the landlord? There is none, since he has never undertaken to provide a porter. The Court of Appeal in *Mischeff's* case (1) cited with approval the passage from the judgment of Henn-Collins J. in the court below, in which he said: "Taking next the presence of the hall porters, 'the plaintiffs undertake to use every precaution to employ 'no one but a competent and trustworthy person as resident 'porter, but beyond that their obligation does not go'—in this case there is not even that provision—"Though the 'porter may, and no doubt does, make himself obliging to the 'tenants, he has no duty to perform for them, and I do not 'think that such attendance as he chooses to give can be said 'to be any part of that for which the tenant pays his rent. 'Much the same considerations apply to the removal of refuse. 'The receptacles are in practice removed from the back doors 'of the flats by someone employed by the plaintiffs to the 'point of collection by the local authority, but this service 'is not stipulated for in the lease, and the tenant would have 'no valid ground of complaint if he was left to make his own 'arrangements for this to be done. I do not think 'atten- 'dance' can be extended to anything to which the tenant is 'not contractually entitled." Whether one agrees with that or not—and I assuredly do—that is an opinion binding on this court, to which we are bound to give effect. Accordingly, I can find nothing here which enables these two tenants to say that the rents which they are paying for these flats are in respect of either furniture or services. It may well be that they expect to get some service and, indeed, it may be highly probable that they will get a certain amount of attendance, but since there is no contractual obligation on the landlord to provide either furniture or services, the rents reserved by the leases do not include payment for the use of furniture or for services.

That is enough to dispose of this case, but I desire to add one further observation. If the lease had contained a provision that the landlord was to provide furniture or services, then, no

(1) [1946] K. B. 645.

doubt, the tribunal would have had jurisdiction to entertain the applications of these two tenants for a reference to fix the rents of their respective flats. But I desire to state for the guidance of these rent tribunals that it does not follow that, because they have jurisdiction to entertain an application to fix a rent, they can reduce the rent, merely because the landlord has not provided that which he has contracted to provide. The Furnished Houses (Rent Control) Act, 1946, gives no power to a rent tribunal to decide questions of breach of contract or to award compensation to tenants for breaches of contract by way of reduction of rent. If premises are let at a rent which includes payment for the use of furniture or services, or both, the only way in which the tribunal can approach the case is that they must see for what the lease provides and whether the rent reserved is a fair rent for the occupation of the premises with the use of the furniture and the services. If it is, then it seems to me the tribunal can do nothing; if they come to the conclusion, say, that 25*0*l. a year is a fair rent for a flat with services which the landlord has undertaken to provide, there is an end to the matter. The fact that the landlord has failed to provide these services means that the landlord is in breach of his covenant and for that breach of covenant the law gives a remedy in damages. These damages have to be sued for and assessed in a court of law, either in the County Court or in the High Court, according to the amount of the damage which has been sustained. But, it is important that it should be known, and I say this for the guidance of the tribunals, that this Act does not, in my judgment, give them any power to reduce a rent because a landlord has failed to provide a service he is contractually bound to provide. If the tribunal were to do that they would arrogate to themselves a right of deciding cases of breach of covenant, which they have no power to decide, and of assessing damages in a way which they have no power to assess them and in a way which the law does not permit, because the law does not allow rent to be reduced because a landlord has not performed his covenant. If a landlord has not performed his covenant, he can be sued in the courts, and the courts will give the tenant proper damages, but those damages are not to be sought by putting forward an application for a reference to fix the rent of premises under the Act of 1946. In my opinion the order for prohibition must go.

ATKINSON J. I agree. I have nothing to add, except that

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reading the affidavits filed on behalf of the tenants, it seems to me to be quite plain that their real complaint is this: "The landlord made certain promises which were never carried out; we knew these promises had not been carried out, when we took the leases, but we think we have a claim for damages for breach of those promises." That is what their case really is, and it is one with which, as my Lord has said, the tribunal has no power to deal.

OLIVER J. I agree, and have nothing to add.

Motion for order of prohibition granted.

Solicitors for applicants: *Thompson & Co.*

Solicitors for the tenants: *Lesser, Garber & Co.*

Solicitors for the rent tribunal: *The Solicitor, Ministry of Health.*

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 [1949] 1 K. B. 666

Explained. R. v. PADDINGTON AND
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 Oliver JJ.

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Where a dwelling-house to which the Rent Restriction Acts apply is let under a contract which includes payment for furniture or services so as to bring it also within the Furnished Houses (Rent Control) Act, 1946, the rent tribunal has no jurisdiction to reduce the rent below the standard rent.

A rent tribunal has no jurisdiction to reduce the rent of premises because the landlord has failed to supply something which he has represented that he would supply but as to which the contract of tenancy is silent. The remedy in such a case is rectification, which a rent tribunal has no power to grant.

MOTION for orders of certiorari.

The applicants were landlords of three houses, Nos. 1, 4 and 6, Craven Hill Gardens, which had been converted into flats. The flats were let unfurnished to various tenants.

Under the leases, which were in the same terms in all the cases before the court, the tenants had the right in common with others to use the water closets, lavatory accommodation and bathrooms in the buildings, but there was no provision for any services. Certain services were, however, in fact provided by the landlords, including electricity for lighting and hot water. It was not suggested that the landlords provided any furniture. All the flats were within the Rent Restriction Acts and in each case the letting was a first letting after their conversion and the rent was, therefore, the standard rent under those Acts.

The tenants of some of the flats applied to the tribunal appointed for the district under the Furnished Houses (Rent Control) Act, 1946, for the reduction of their rents and on March 7, 1947, the tribunal made orders reducing the rents.

The landlords thereupon obtained leave to move for orders of certiorari to bring up the orders made by the tribunal to be quashed on the ground that the tribunal had no jurisdiction to make them for the reason that the flats were outside the provisions of the Furnished Houses (Rent Control) Act, 1946, because (1.) they were controlled by the Rent Restriction Acts, and (2.) the landlords were not bound by the leases to render any services.

Paull K.C., Percy Lamb and D. Purcell for the applicants. The tribunal had no jurisdiction to reduce the rent in these cases for two reasons: (1.) because the premises were controlled by the Rent Restriction Acts and were outside the provisions of the Furnished Houses (Rent Control) Act, 1946; and (2.) because, in the case of the flats at Nos. 1 and 4, Craven Hill Gardens, the leases contained no provisions whereby the landlords were bound to give any services.

As to the first point, it is not contended that no house which comes within the Rent Restriction Acts can be governed by the Act of 1946, but it is submitted that the rent of such a house cannot be reduced under the last-mentioned Act below the standard rent. If it could, it would lead to all sorts of difficulties. For instance, suppose the landlord of a house within the Rent Restriction Acts divided it into three flats and an application for apportionment were made to the county court, then if the apportioned rents could subsequently be altered by a rent tribunal, the result of the apportionment, which under s. 12, sub-s. 3, of the Increase of Rent and Mortgage

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Interest (Restrictions) Act, 1920, is clearly intended to be final, would not be so. Moreover, the standard rent would be altered. A further result might be that a landlord who let one flat unfurnished and without services might be receiving more rent for that flat than for another flat which he let with furniture or services. It is clear that the Act of 1946 was not intended to interfere with the rent of any house which is fixed under the Rent Restriction Acts, because s. 7 of the former Act (1) says that, save as therein mentioned, nothing is to affect those Acts.

H. L. Parker for the rent tribunal. The position is that in the case of houses which are within the Rent Restriction Acts there are two jurisdictions running side by side and different rents may be arrived at under each lot of statutory provisions. Under s. 2, sub-s. 1, of the Furnished Houses (Rent Control) Act, 1946, the rent tribunals are given *prima facie* jurisdiction in the case of any letting where there is a payment for furniture or services. Where there is such a letting and the premises also come within the Rent Restriction Acts, the tenant can avail himself of either set of legislation and the landlord can only recover whichever may be fixed as the lower rent. Although the standard rent of houses falling within the Rent Restriction Acts is fixed under those Acts, there is no provision in those Acts entitling the landlord to recover the standard rent: he is only entitled to recover an amount not exceeding the standard rent. The applicants are trying to read s. 7 of the Act of 1946 as if it said simply that nothing in that Act is to apply to any house to which the Rent Restriction Acts apply, but Parliament has not said that. That section relates to the effect of registration on the application of ss. 9 and 10 of the Act of 1920. The words "save as aforesaid" mean that nothing in the Act is to affect the tenant's right to remain in possession. The position might be different in the case of a statutory tenant where there is no contract, but where there is a contract of letting the landlord's rights are determined by the contract and not by the Rent Restriction Acts. Therefore it cannot be true to say that

(1) Furnished Houses (Rent Control) Act, 1946, s. 7: "Sections 9 and 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 . . . shall not apply as regards the rent charged for any house or part of a house	" entered in the register under the provisions of this Act " but save as aforesaid nothing in this Act shall affect any provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939."
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rent tribunals have no jurisdiction over houses to which those Acts apply and this motion should be dismissed.

As to the argument that the contracts of letting in the present case do not provide for any services, there are many circumstances which show that there must be an implied obligation on the part of the landlords to provide services. For instance, since there are hot taps and radiators in the flats and the tenants have no means of heating water, there must be an implied obligation on the part of the landlords to supply hot water. Again, there must be an implied contract to supply electricity for light.

Bernstein for the tenants of No. 6, Craven Hill Gardens. It is clear that one of the matters with which the Act of 1946 was specifically intended to deal was the case of a house let out in flats, and where there is any payment in respect of furniture or services the rent tribunal has jurisdiction to entertain an application for reduction of rent. There can be no doubt that a house can come within the Rent Restriction Acts in certain circumstances notwithstanding that furniture or services or both are provided, and all that s. 7 of the Act of 1946 does is to make it clear that after registration of a house under that Act, ss. 9 and 10 of the Rent Restriction Act of 1920 do not apply to it. The rent tribunal in the present case therefore had jurisdiction to reduce the rent.

LORD GODDARD C.J. It was agreed that all these flats come within the Rent Restriction Acts and the question really turns on the provisions of s. 7 of the Furnished Houses (Rent Control) Act, 1946. I desire to emphasize here, as this court did in *Rex v. Hampstead and St. Pancras Rent Tribunal. Ex parte Ascot Lodge* (1), that we are not concerned with the policy of the Act, except in so far as it throws light on interpretation, for which purpose it is a sound rule that the court should look at the mischief intended to be cured as well as to the remedy provided. The mischief was the letting of property at an excessive rent where furniture or services were provided, either or both of which might be of little value. It cannot be contended, and Mr. Paull did not seek to contend, that no house or flat which was controlled by the Rent Restriction Acts could come within the jurisdiction of the tribunal: in many cases it would be most proper for such property to be dealt with by the tribunals. A landlord of a flat with a controlled rent of, say, 80*l.* a year

(1) Ante p. 973.

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might put in a few sticks of furniture or provide a service of some trifling nature, and then charge an excessive rent : that would be a very proper case for the tribunal to deal with. What is said here is that in the case of a house within the Rent Restriction Acts, while there may be jurisdiction to hear the case and to give certain relief, the tribunal has no right to reduce the rent below the standard rent. It is true that in this case the rents are those of a first letting of these flats after the houses were converted, and the rents in the actual leases before the court are, therefore, the standard rents. This is fortuitous, and can make no difference. If the tribunal had jurisdiction to do what they have done here, they could act in the same way whenever the standard rent was fixed since these Acts first came into force, even if the first letting had been fifty years ago. It would, indeed, be a curious result if a landlord who let a flat at the standard rent, which incontestably is the rent recoverable under the Rent Restriction Acts and is permitted by that legislation, were liable to have that rent reduced merely because he agreed to give his tenant something in addition, such as hot water, or some central heating, or put in a couple of pieces of furniture, and still charged only the standard rent. It is, of course, in the highest degree unlikely that a new letting would ever be made at or under the standard rent with something given in addition. It is not at all unlikely that a landlord might let a flat or rooms at the standard rent and give something in addition for a further consideration. If that were done, since the additional consideration has to be regarded as part of the rent under s. 12, sub-s. 2, of this Act, I have no doubt the tribunal could then take the matter into consideration and, if they saw fit, give a reduction, so, however, that they did not reduce the total sum payable below the standard rent. If they can reduce the standard rent, I do not see how it can be said that they are not, by using the provisions of the Furnished Houses (Rent Control) Act, 1946, affecting the provisions of the Rent Restriction Acts within the meaning of s. 7 of that Act. Jurisdiction to fix standard rents, and to apportion rents, is given to the county court judge without appeal. I should expect to find very clear words in the present Act if it were intended that these tribunals could deal with rents determined by the courts. Here, the language of s. 7, seems to me to contemplate the exact opposite, and if the tribunals can reduce the standard rent, I can attach no meaning to the concluding words of the section. Whatever else they can do,

it seems to me clear they cannot affect the standard rent. If they could, the resulting situation would be startling indeed. What would become of the right of the landlord to make the statutory additions permitted by the Rent Restriction Acts? Where the county court judge has apportioned the rent as to rooms X at so much and rooms Y at so much, how can the tribunal say: "We shall alter that, and say rooms X are only 'worth so much less?'" In the case of, say, a weekly or monthly tenancy, where the rent is under the standard, a landlord can determine the tenancy by notice and let again to the tenant at the standard rent, but under this Act, he would apparently be deprived of this right, because the registered rent would become the rent for all purposes.

Mr. Parker agreed that a difficulty might arise in the case of a statutory tenant and suggested that, as there was in that case no contract, the provisions of the Act might not apply. But take the case of a house let at *xl.*, and reduced by *xl.* — *yl.* so that it is under the standard rent. The tenant dies, and a member of his family asserts his right to remain as a statutory tenant. It has been decided by the Court of Appeal in *Phillips v. Copping* (1), approved in the House of Lords in *Regional Properties, Ltd. v. Oxley* (2), that the statutory tenant is bound then to pay the standard rent. Yet the landlord might find himself faced with an order fixing a lower rent under the Furnished Houses (Rent Control) Act, 1946, until the expiration of that Act or for a shorter period, under which he could not demand the higher rent without exposing himself to fine and imprisonment. In my opinion there is no jurisdiction in these tribunals to reduce the rent below the standard rent. They are forbidden to do so by s. 7, which, in my opinion, preserves, among other things, the standard rent and leaves all rights in respect of it, whether of the landlord or the tenant. If a tribunal finds that a house, the standard rent of which is *xl.*, is let for *xl.* plus *yl.*, *yl.* representing the use of furniture or services, they can deal with *yl.* as they like, so long as the total is not reduced below *xl.*

This is enough to dispose of all the cases, but in respect of Nos. 1 and 4, the further point is taken that the landlord has not covenanted to supply anything, and therefore that the case is covered by *Rex v. Hampstead and St. Pancras Rent Tribunal. Ex parte Ascot Lodge* (3). It is said in answer that the tenants

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(1) [1935] 1 K. B. 15.
(2) [1945] A. C. 347.

(3) Ante p. 973.

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are given the right to use a bathroom in common with others, and, therefore, it must be implied that the landlord covenanted to supply hot water. Further it is said that he, in fact, supplies electricity for lighting, because he makes no charge for it, though he does for power, the power current being supplied by slot meters from which he collects the money. The answer to that, I think, is the same as in *Rex v. Hampstead and St. Pancras Rent Tribunal* (1). The lease imposes no obligation on him to supply hot water, any more than it imposes an obligation on the tenant to use the bathroom. If the landlord cannot get coal, that would be no defence if he had contracted to supply hot water or heating. But, it was said, you ought to imply some covenant, for instance, to supply unless prevented by causes beyond his control. There is no ground, in my opinion, for implying any covenant. No covenant ought ever to be implied unless there is such a necessary implication that the court can have no doubt what covenant or undertaking they ought to write into the agreement. In these days of shortages of essential commodities, and with the provisions of modern legislation such as this Act before their eyes, landlords may well refuse to bind themselves to promise any service, however willing to give it as a matter of grace or concession. So far as the electric supply is concerned, here again there is no promise to supply it; the only promise is that the tenant is to pay for what the meter shows he has consumed.

I think it is desirable to add one word, again for the guidance of these tribunals. This court has already pointed out in *Rex v. Hampstead and St. Pancras Rent Tribunal* (1) that they cannot try breaches of contract, and cannot reduce rent by virtue of this Act because a landlord has not given something which he undertook by his contract to provide. Still less can they reduce rents because the landlord may have represented that he would provide something as to which the lease is silent. In these cases, or some of them, it is clear that what the tenants are really saying is that the lease does not give them that for which they bargained. If that be so, their remedy is rectification, which can only be decreed by a court of equity, and they cannot get it by applying to a furnished houses rent tribunal, which has no power to give it. In my opinion, the orders for certiorari must go.

ATKINSON J. I agree. In this case the tenancy agreements are all in the same form; the rooms are let, along with the

(1) *Ante* p. 973.

right in common with others, to use the "water closets, lavatory
"accommodation and bathrooms situate in the said building."

It is not suggested there is any furniture in any of these rooms, and the contracts provide for no services whatever. It is plain that they are not contracts within the Furnished Houses (Rent Control) Act, 1946. But, it is said, electricity for lighting purposes and hot water are, in fact, supplied to the different flats; and it is argued that the rendering of these services brings the lettings within the Act. However, I adhere to the view this court expressed in *Rex v. Hampstead and St. Pancras Rent Tribunal* (1), that services voluntarily rendered do not bring within the Act contracts which would not otherwise be within it. It is the contract that has to be considered. This is plain from ss. 2 and 3 of the Act. Section 2 begins:

"Where a contract has been entered into
"it shall be lawful for either party to the contract or
"for the local authority to refer the contract to the
"tribunal for the district, and where any such contract
" is so referred to the tribunal," they may do certain things. Sub-section 2 provides: "Where any contract to which this Act applies is referred to a tribunal
"the tribunal shall consider it, and, after making such inquiry
"as they think fit shall approve the rent payable under
"the contract or reduce it." A similar question has arisen with regard to the Rent Restriction Acts. In *Michael v. Phillips* (2) it was argued that where there was a letting, and in fact certain furniture was thrown in, although not provided for in the letting, that ought to be enough to take the house out of the Act, but Bankes L.J. said: "Mr. Matthews argued
"strenuously that the facts of the case must be considered
"without regard to the obligations in the lease and that if the
"rent of the tenement in fact covered attendance then it ought
"to be held that the case came within proviso (i.) to s. 12,
"sub-§. 2. I cannot agree. On the plain construction of the
"proviso it applies only to board, attendance and use of
"furniture which as between the landlord and tenant the
"landlord has contracted to provide." Scrutton L.J. said the same thing. The same view was taken in *Property Holdings Co., Ltd. v. Mischeff* (3). The headnote says: "Held (1.) that
"since there was no contractual right on the part of the tenant
"to such attendance as was in fact provided, the flat was not
"let at a rent which included payments in respect of atten-

(1) Ante p. 973.

(2) [1924] 1 K. B. 16, 25.

(3) [1946] K. B. 645.

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"dance." I think that the forms which are sent to the lessee by the tribunal for him to fill in are framed on the wrong basis. There is no question asking what services are contracted for, but question No. 5 is: "Services provided for you by the lessor." In answer to that question, services which may in fact be provided are filled in, although they may have no relation to the contract. That seems to me to indicate that the tribunal is approaching these questions from a wrong point of view. If the tenant contends that the lease does not in fact contain the real terms agreed upon, he may or may not have a case for rectification, but, if he has, he must seek that rectification in the appropriate court. I am quite satisfied that these tribunals have no power to rectify contracts, or to treat them as rectified without even going through the process of rectifying. It was argued that, at any rate, the facts indicate an implied obligation to provide hot water; and it was said: "There are the pipes and the taps, and there are no means of heating water in the flats; it is quite clear there is an intention by the landlord to provide hot water, because there is no other source from which it can come except the boilers in the basement; and therefore such an obligation ought to be implied." My Lord dealt with that, but I would add that, in my view, if the question had been raised, the landlord might very well have said: "I am not going to enter into any contractual obligation to supply hot water. I may not be able to get coal. I am not going to promise, because if I do, I shall bring the letting within the Act, and I do not intend to do that. If I supply hot water, it will be on a voluntary basis, and I will do my best. You can take it or leave it, but I am not going to enter into any contract with regard to it." There is nothing wrong about an attitude of that sort, and, in my opinion, the tribunal is not entitled to consider services which are voluntarily rendered.

There is another point with which the court has to deal because, as to No. 6, Mr. Paull said the lessors did not choose to rely upon the above contention. He, therefore, relies upon a further contention that, these lettings being admittedly within the Rent Restriction Acts, the furnished houses rent tribunals have no power to reduce the rents below the standard rents. Lettings seem to fall into three classes: (1.) those in which there is no furniture and no attendance included; (2.) those in which a substantial portion of the rent is fairly attributable to the use of furniture or to attendance; and

(3.) those in which part of the rent not amounting to a substantial portion is attributable to the use of furniture or to attendance. As to the first, the Act of 1946 can have no application; as to the second, the Rent Restriction Acts can have no application; as to the third, on the face of it, they may be within both Acts, and in that case, the question arises: Which set of provisions is to prevail?

The Act of 1946 seems to answer the question by s. 7. Sections 9 and 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, are really outside the scheme of the Rent Restriction Acts: they relate to furnished houses only. Therefore, I do not think the fact that ss. 9 and 10 up to a point still have some application, notwithstanding the Act of 1946, throws any light on the meaning of the last three lines of s. 7, which seem to me to express quite clearly that if there is a conflict between the two Acts, it is the Rent Restriction Acts which must govern the contract. There is one consideration which, to my mind, settles this beyond argument. Under the Rent Restriction Acts a landlord is entitled to charge the standard rent. Apart from those Acts he cannot increase the rent during the life of a tenancy or lease, because he is bound by his contract, but when the existing tenancy or lease expires, he is entitled under those Acts to charge the standard rent, plus two permitted increases; one is the 8 per cent. on any money which has been spent on structural improvements, and the other is an increase in respect of an increase of rates. Of the tenancies in the present case, one expired on March 31 of this year, another expires in November, two expire in March next year, and one in January, 1949. Under the Rent Restriction Acts, on the expiry of these tenancies the landlords are entitled, and are expressly permitted, when a new agreement is entered into, to charge the standard rent plus those increases. But what happens if these premises are within the Furnished Houses (Rent Control) Act, 1946, and the reductions of rent are good? Under s. 3 the reduced rents have to be registered; and under s. 4 they can at no time be exceeded. It would be absurd to say that that would not be depriving the lessors of rights expressly given to them by the Rent Restriction Acts, on any new letting, to charge the standard rent plus what are called the permitted increases. The words "Save as aforesaid" "nothing in this Act shall affect any provisions of the Rent and Mortgage Interest Restrictions Acts" seem to me to make it clear that there can be no power in these tribunals to do

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anything to interfere with that right, even if for some purposes the tribunal can still deal with the letting. That seems to me a sufficient ground upon which to hold that all these decisions are ultra vires, and that these orders ought to go.

OLIVER J. I agree, and have only this to add. Mr. Parker made a point on the concluding words of s. 7 of the Furnished Houses (Rent Control) Act, 1946. by arguing that the Rent Restriction Acts do not authorize the charging of the standard rent, and, therefore, if you reduce the standard rent, you are not affecting the provisions of the Rent Restriction Acts. It is quite true the Rent Restriction Acts do not in terms authorize charging the standard rent, but implicitly they do. They say in effect that a contract between the parties, up to the amount of the standard rent, is enforceable, and I cannot attribute any other meaning to them.

Orders for certiorari granted.

Solicitors for applicants : *Thompson & Co.*

Solicitor for rent tribunal : *Solicitor, Ministry of Health.*

Solicitor for tenants : *Barnett Janner.*

H. A. P.

1947
 May 2.

Lord Goddard
 C.J.,
 Atkinson and
 Oliver JJ.

CAPPER v. WILLIAMS.

Local government—Planning scheme—Conditional permission to use land—Breach of condition—Prosecution—Necessity for order prohibiting use—Town and Country Planning (Interim Development) Act, 1943 (6 & 7 Geo. 6, c. 29), s. 5, sub-ss. 1, 5.

A builder, who owned premises within an area with regard to which a resolution to prepare a scheme under the Town and Country Planning Acts was in force and which was zoned as a residential area, was granted by the local authority permission to use them as a builder's store on condition that they were used for that purpose only and that no work was done there. He subsequently broke that condition :—

Held, that the builder could not be prosecuted under s. 5, sub-s. 5, of the Town and Country Planning (Interim Development) Act, 1943, until an order had been made under sub-s. 1 of that section prohibiting the use of the land otherwise than in accordance with the terms of the permission granted to him.

CASE STATED by justices.

At a court of summary jurisdiction sitting at Birkenhead an information was preferred by the respondent, a solicitor and clerk of the Holylake Urban District Council, against the appellant, charging him with having on February 14, 1946, and on various dates thereafter, whilst a resolution to prepare a scheme under the Town and Country Planning Acts, 1932 to 1943, was in force in respect of a certain area in the Hoylake Urban District, unlawfully used certain land in that area in a manner prohibited by a permission granted by the council as the town planning authority contrary to s. 5 of the Town and Country Planning (Interim Development) Act, 1943 (1).

At the hearing the following facts were proved or admitted. The appellant was the owner and occupier of a building and land appurtenant situate within the Hoylake Urban District, and carried on the business of a builder. The premises in question were situate in an area subject to a resolution passed by the Wirral Joint Planning Committee constituted under the Town and Country Planning Act, 1932. By a resolution, dated April 9, 1940, that resolution was adopted by the Hoylake Urban District Council as interim development authority. Under the scheme the area in which the appellant's premises were situated was zoned for residential purposes. The appellant habitually used his premises for the general purposes of his business and for working a gas engine and manufacturing concrete slabs. Being threatened by the council with an order prohibiting the use of the premises as a builder's yard, the appellant offered an undertaking that he would use the premises as a store only and not use any machine there. Thereupon,

(1) Town and Country Planning (Interim Development) Act, 1943, s. 5, sub-s. 1: "If while a resolution to prepare or adopt a scheme under the principal Act is in force with respect to any area, any development of land within that area is carried out after the commencement of this Act otherwise than in accordance with the terms of the interim development order or of permission granted under that order, then, subject to the provisions of this section, the interim development authority

" may, if they are satisfied that it is necessary or expedient so to do having regard to the provisions then proposed to be included in the scheme
 "(b) where the development consists of any use of the land or any building thereon, by order prohibit that use, and, where necessary, reinstate the land."

Section 5, sub-s. 5: "If any person uses any land or building in a manner prohibited by an order under this section, he shall be guilty of an offence"

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the council granted him permission to use the premises "on condition that the building be used for the purpose of a builder's store and that no work of any description be done on the premises or on any land adjoining or appurtenant thereto." The appellant nevertheless continued to use the premises as before, working the gas engine and making the concrete slabs.

The justices held that the appellant had committed an offence under s. 5, sub-s. 5 of the Town and Country Planning (Interim Development) Act, 1943, and convicted him, but at the appellant's request they stated this case for the opinion of the High Court.

Kennan for the appellant.

Baucher for the respondent.

LORD GODDARD C.J. It is plain that under s. 5 of the Town and Country Planning (Interim Development) Act, 1943, a person who wants to carry out work which is not in accordance with the terms of the interim order may ask for permission to do it, and the planning authority may give him permission and attach any conditions they choose. If, after they have given the permission on certain conditions, he does not obey the conditions and carries out work of development otherwise than in accordance with the permission, the Act seems to contemplate a second order, namely, an order prohibiting that work. The appellant in this case without doubt deserved to be prosecuted but, unfortunately, it does not seem that the proper procedure has been adopted. An order ought to have been made against him. The summons itself indicates the difficulty which the council were in, because it charges him that "whilst a resolution to prepare a scheme under the Town and Country Planning Acts, 1932 to 1943, was in force in respect of an area in the urban district of Hoylake unlawfully did use certain land situated at Black Horse Hill being in such area in a manner prohibited by a permission." At first sight, that sounds a very odd thing. I am far from saying that the council might not, when they granted the permission, have included on the same piece of paper an order forbidding him to use the land in the manner they did. But what they issued to him was headed as a "Limited Permission," and was subject to a condition, which he did not obey. It seems to me that the court is bound to give effect to the technical point that is taken and say that

the council could not prosecute the appellant until they had made an order prohibiting the use otherwise than in accordance with the terms of the permission. With some regret, therefore, I have come to the conclusion that this conviction must be quashed.

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ATKINSON J. I agree. The difficulty the respondent council are in seems to me to be that the order contemplated by s. 5, sub-s. 1, is an order made after breach of the conditions of the permission. Here it is sought to contend that the permission itself is the order contemplated by that sub-section. That seems to me impossible, because the permission is granted before anything wrong is done, whereas it is clear that the order contemplated is one the authority has power to make after the breach of the conditions has been committed. I therefore think they were premature in their prosecution.

OLIVER J. I agree that this technical point must succeed and the conviction be quashed.

Appeal allowed.

Solicitors for appellant: *Field, Roscoe & Co., for Berkson & Berkson, Birkenhead.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for T. Elved Williams, clerk to Hoylake Urban District Council.*

H. A. P.

REX v. STEANE.

C. C. A.

Criminal law—Act likely to assist the enemy, "with intent to assist the enemy"—Broadcasting in Germany during the war—Evidence of threats and assaults by enemies—Desire to save wife and children from concentration camp—Motive or intent—Criminal intent laid in charge on indictment—Presumption of intending natural consequence of deliberate act—Onus of proof, where accused in subjection to power of others—Direction to jury.

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April 15;
May 1.

Lord Goddard
C.J.,
Atkinson and
Cassels JJ.

Where an intent is charged in an indictment, the burden of proving that intent remains throughout on the prosecution. If the prosecution prove an act the natural consequence of which would be a certain result and no evidence or explanation is given,

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then a jury, on a proper direction, may find that the accused is guilty of doing the act with the intent alleged to obtain that result, but if on the totality of the evidence, there is room for more than one view as to the intent of the accused, the jury should be directed that it is for the prosecution to prove the intent charged to the jury's satisfaction, and, if on a review of the whole evidence, they either think that that intent did not exist or they are left in doubt as to the intent, the accused is entitled to be acquitted. Moreover, if the act is done by a person in subjection to the power of others, the guilty intention cannot be presumed, but must be proved. The jury must be satisfied that the accused had the intention charged before any question of duress can arise, since the onus of proving duress lies on the accused.

The appellant, a British subject, was charged with doing an act likely to assist the enemy with the intent to assist the the enemy—entering the service of the German broadcasting system—contrary to reg. 2A of the Defence (General) Regulations, 1939. The appellant did enter that service and broadcast through that system, but gave evidence that this was done under the pressure of threats and of beatings up and with a view to saving his wife and children (who were in Germany) from a concentration camp. The trial judge directed the jury that if they thought that what the appellant did was to help the enemy, then, unless he was without any intent at all, by reason of some duress, he must be taken to have intended by his act to assist the enemy, that is, he must have intended the natural consequence of his deliberate act. The appellant was convicted and, on appeal, it was contended for the Crown that the saving of his wife and children from a concentration camp might have been the appellant's motive for his act, but that this was irrelevant on the issue of whether he acted with the intent alleged :—

Held, that where an act was done by a person in subjection to the power of others, e.g., the power of a brutal enemy, an inference could not be drawn that he intended the natural consequence of such an act merely from the fact that he did it. The guilty intent could not be presumed but must be proved. The proper direction to the jury here was that the prosecution must prove the intent to assist the enemy and that while the jury would be entitled to presume that intent, if they thought the broadcasting was done as the result of the free uncontrolled action of the accused, they would not be entitled to presume it, if the circumstances showed that the act was done in subjection to the power of the enemy or was as consistent with an innocent as with a criminal intent.

Conviction quashed on the ground of inadequate direction as to the criminal intent charged and as to the appellant's defence, by failing to remind the jury of the various threats and assaults to which the accused swore that he had been exposed.

APPEAL from a conviction at the Central Criminal Court before Henn-Collins J. on an indictment charging the appellant

with doing acts likely to assist the enemy with intent to assist the enemy contrary to reg. 2A of the Defence (General) Regulations, 1939 (1). He was charged on the first count, with entering the service of the German Broadcasting System on a date in January, 1940 and the jury were discharged from returning a verdict in respect of eight other counts.

The appellant, a British subject, entered the service of the German broadcasting system, and on several occasions broadcast through that system. The evidence called by the prosecution was that of one witness who proved that the appellant did, in fact, so broadcast and said that he had seen a telegram, in the appellant's possession, signed Emmie Goering, which stated that he could expect to be released and be home very shortly. The principal evidence against him was a statement taken from him by an officer of the British Intelligence Service in October, 1945, purporting to give an account of his activities in the German broadcasting service, concluding with the words: "I have read this statement over" and to the best of my knowledge and belief it is all true, and "must request it to be used in conjunction with my written" report dated July 5, 1945 to the American C.I.C. in Augsburg." This earlier report was not produced in evidence. Before the war, the appellant was employed in Germany as a film actor and was so engaged when the war broke out. His wife and two sons were living in Germany. On the outbreak of war the appellant was at once arrested, but his wife and two sons remained in Oberammergau.

The only other evidence was that of the appellant. He said that on his arrest he was questioned and that the interview ended with the order: "Say Heil Hitler, you dirty swine." He refused and was thereupon knocked down losing several teeth, and he was interned on September 11, 1939. Just before Christmas of that year he was sent for by Goebbels, who asked

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(1) By reg. 2A of the Defence (General) Regulations, 1939: "If" with intent to assist the enemy, "any person does any act which is" likely to assist the enemy . . . "then, without prejudice to the" law relating to treason, he shall "be guilty of an offence against" this regulation and shall, on "conviction on indictment, be" liable to penal servitude for life."

By the effect of The Emergency Laws (Transitional Provisions) Act, 1946, this regulation was not continued in force and, therefore, lapsed on February 24, 1946. For extra-territorial effect of the Defence (General) Regulations, 1939, see s. 3, sub-s. 1 (b) of the Emergency Powers (Defence) Act, 1939.

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him to broadcast. He refused. He was thereupon warned that he was in an enemy country and that they had methods of making people do things. A week later an official named von Bockman saw him and dropped hints as to German methods of persuasion. A professor named Kossuth also warned him that these people could be dangerous to those who gave trouble. In consequence he submitted to a voice test, trying to perform as badly as he could. The next day he was ordered to read news three times a day, and did so until April, 1940. In that month he refused to do any more broadcasting. Two Gestapo men called on him. They said: "If you don't obey, your wife and children will be put in a concentration camp." In May three Gestapo men saw him and he was badly beaten up, one ear being partly torn off. He agreed to work for his old employers, helping to produce films. There was no evidence that the films he helped to produce were or could be of any assistance to the Germans or at all harmful to this country. He swore that he was in continual fear for his wife and children. He asserted, and said he had asserted, in his report of July 5, 1945, that he never had the slightest idea or intention of assisting the enemy, and that what he did was done to save his wife and children and that what he did could not have assisted the enemy except in a very technical sense. There was no record of the actual broadcasts made by the appellant.

Henn-Collins J. in the course of his summing up to the jury said: "You will see that there are two distinct elements in that charge. I am going to reverse the order of them first of all: 'doing an act likely to assist the enemy.' If done 'with an intent to assist the enemy,' it constitutes the offence.

"In order that you may have clearly in your minds the distinction between those things, let me give you an instance which was quite common a little while ago in the war time. Take the black-out. By a piece of carelessness you forgot to put the black-out up. Well, that was an act likely to assist the enemy, but it was not done with the intent of assisting the enemy. On the other hand, if there were such evilly disposed persons who put their lights up without their black-out, and you could prove it was for the purpose of assisting the enemy, then the offence would be committed. There is that difference between the two.

"The first statement in this offence is of 'an intent to assist the enemy.' Where an intent is charged in law, of course, you have to inquire as best you can into the motives which are

" actuating a person. You cannot take the lid of his skull off
 " and look inside and see how his mind is working. You have
 " to judge that from what he did and from all the surrounding
 " circumstances. If the circumstances are such that a man
 " could have no intent at all, and intent is an element in the
 " offence, there is no offence, and hence, it comes about that,
 " if the circumstances are sufficient to overbear a man's will
 " altogether and compel him under what lawyers call duress to
 " do an act, it is not an act of his will at all, but if what he
 " apprehends or has suffered is not sufficient to overcome the
 " will of an ordinary man, well, then he still acts with a will
 " and with intent.

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" Subject to that, a man is taken to intend the consequences
 " of his deliberate acts, not his accidental acts. Going back to
 " the instance I gave you of the black-out, you are not taken to
 " intend to assist the enemy if you did not intend to do what
 " you did do. It follows from that, therefore, that here, if
 " your view is that what the accused did was to help the enemy,
 " then unless he was without any intent at all by reason of some
 " duress, which I will explain a little further in a moment,
 " he must be taken to have intended by that act to assist the
 " enemy.

" The test of duress has been quite correctly put to you.
 " It is, quite shortly, this. Was he subjected to personal
 " violence or ill-usage or reasonable apprehension of one or other
 " of such a degree as to bear down the will of a man of ordinary
 " courage and resistance ? "

The appellant was convicted and sentenced to three years
 penal servitude, but appealed.

Roberts K.C. and *E. Clarke* for appellant. The summing-up
 of the trial judge to the jury was inadequate. The jury were
 never specifically asked whether the act which the appellant
 admittedly did—entering the service of the German broad-
 casting system—was due to the intent to assist the enemy.
 The appellant's case was that his act was done with the intent
 that his wife and children should not be sent to a concentration
 camp. If the evidence was consistent with that being the
 appellant's intent, he was entitled to be acquitted. Once that
 intention had been put forward, the jury could not act on any
 presumption that the appellant must be taken to have intended
 the natural consequence of his acts. The judge said that if
 what the accused did was to help the enemy, then unless he was

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without any intent at all by reason of some duress, he must have intended by that act to assist the enemy. This was misdirection. Before any question of duress, which is a matter of defence, could arise, the prosecution had to prove an intent to assist the enemy, and, in face of the evidence given by the appellant, there was no presumption that the appellant intended to help the enemy. Whether there was that intent was a question of fact and the trial judge did not remind the jury of the threats to which the appellant had been exposed or of the atmosphere of terror to which he was subjected.

Gerald Howard and *J. S. Bass* for Crown. On the evidence it was clear that the appellant did an act likely to assist the enemy, and so, as a natural consequence, in the absence of accident, with an intent to assist the enemy. He must have intended the natural consequence of his act. His motives for doing the act are irrelevant, except perhaps, on the issue of duress. The fact that the appellant did the act for this or that reason, for money or to avoid calamity to himself or his family, shows his motive or motives—not his intention. The question on this issue was not: Why did the appellant broadcast? But what was his intention at the moment when he entered the German broadcasting system? In *Stephen's History of the Criminal Law of England*, vol. 2, at pp. 110–11, the learned author wrote: “I have already pointed out the “place which intention occupies in voluntary action. It is the “result of deliberation upon motives, and is the object arrived “at by the action caused or accompanied by the act of volition. “Though this appears to me to be the proper and accurate “meaning of the word, it is frequently used and understood “as being synonymous with motives This confusion “of ideas not infrequently leads to failures of justice. . . . “The only possible way of discovering a man's intention is by “looking at what he actually did, and by considering what must “have appeared to him at the time the natural consequence “of his conduct.” Alternatively, a man may have more than one intent for his act.

On the issue of duress, it must be shown that an accused was compelled by force or fear within the meaning of duress, i.e. fear of immediate death or of instant bodily injury (a fear of future pains and penalties will not suffice) so that his will was completely overborne. Stephen in his *History of the Criminal Law* goes so far as to suggest that logically “compulsion by threats

"ought in no case whatever to be admitted as an excuse for crime, though it may and ought to operate in mitigation of punishment in most, though not in all cases." (History of the Criminal Law of England, vol. 2, at p. 108). No doubt, Hale states that in regard to compulsion and fear "there is to be observed a difference between the times of war or public insurrection or rebellion, and the times of peace." (1 Hale's Pleas of the Crown, Ch. 8, p. 49.) See also Russell on Crime (9th ed.), vol. 1, at p. 41. [*Kaufman v. Gerson* (1) and *Seear v. Cohen and Another* (2) were referred to.]

Roberts K.C. replied.

LORD GODDARD C.J. The appeal will be allowed and the conviction quashed. We will give our reasons for this decision later.

May 1. LORD GODDARD C.J. read the judgment of the court. The earlier statement made by the appellant to the American C.I.C. in Augsburg was not produced. That, no doubt, was inevitable, but, none the less, unfortunate, especially as the appellant in his evidence maintained that many matters were contained in that report which, accordingly, he did not restate in the statement which he made to the British Intelligence Officer. That a record of the appellant's broadcasts in Germany was not given in evidence again was, no doubt, inevitable, but unfortunate, as the actual tone of the broadcast might have thrown some light upon the motives and intentions of the appellant, but, in the opinion of the court, there was undoubtedly evidence from which a jury could infer that the acts done by the appellant were acts likely to assist the enemy.

The far more difficult question that arises, however, is in connexion with the direction to the jury with regard to whether these acts were done with the intention of assisting the enemy. The case as opened, and indeed, as put by the learned judge appears to this court to be this: A man is taken to intend the natural consequences of his acts; if, therefore, he does an act which is likely to assist the enemy, it must be assumed that he did it with the intention of assisting the enemy. Now, the first thing which the court would observe is that, where the essence of an offence or a necessary constituent of an offence is a particular intent, that intent must be proved by the Crown just as much as any other fact necessary to constitute the offence.

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(1) [1904] 1 K. B. 591.

(2) (1881) 45 L. T. 589.

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The wording of the regulation itself shows that it is not enough merely to charge a prisoner with doing an act likely to assist the enemy ; he must do it with the particular intent specified in the regulation. While no doubt the motive of a man's act and his intention in doing the act are, in law, different things, it is, none the less, true that in many offences a specific intention is a necessary ingredient and the jury have to be satisfied that a particular act was done with that specific intent, although the natural consequences of the act might, if nothing else were proved, be said to show the intent for which it was done. To take a simple illustration, a man is charged with wounding with intent to do grievous bodily harm. It is proved that he did severely wound the prosecutor. Nevertheless, unless the Crown can prove that the intent was to do the prosecutor grievous bodily harm, he cannot be convicted of that felony. It is always open to the jury to negative by their verdict the intent and to convict only of the misdemeanor of unlawful wounding. Or again, a prisoner may be charged with shooting with intent to murder. Here again, the prosecution may fail to satisfy the jury of the intent, although the natural consequence of firing, perhaps at close range, would be to kill. The jury can find in such a case an intent to do grievous bodily harm or they might find that if the person shot at was a police constable, the prisoner was not guilty on the count charging intent to murder, but guilty of intent to avoid arrest. The important thing to notice in this respect is that where an intent is charged in the indictment, the burden of proving that intent remains throughout on the prosecution. No doubt, if the prosecution prove an act the natural consequence of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted. In many offences it is unnecessary to allege any particular intent. The commonest case is in larceny where the prisoner is simply charged with stealing. If the evidence shows that the prisoner picked a person's pocket, there is no necessity to prove that he intended to steal, although he may give some evidence

in defence which would lead the jury to believe that he was not acting with a felonious intent. But, we repeat that where a particular intent must be laid and charged, that intent has to be proved. An illustration given by the learned judge in the course of his rather brief summing-up, related to what are commonly called the black-out regulations. He pointed out to the jury that if a person accidentally omitted to put up his black-out curtains or left some gap in them, although he was doing an act likely to assist the enemy, as it was accidental, he would not be committing the offence with intent to assist the enemy. Matters which involve accidental acts are perhaps not altogether a happy illustration. A nearer case would be if a person deliberately took down his black-out curtains or shutters with the result that light appeared on the outside of his house, perhaps during an air raid ; it might well be that if no evidence or explanation were given, and if all that was proved was that, during that raid the prisoner exposed lights by a deliberate act, a jury could infer that he intended to signal or assist the enemy. But, if the evidence in the case showed, for instance, that he or someone was overcome by heat and that he tore down the black-out to ventilate the room, the jury would certainly have to consider whether his act was done with intent to assist the enemy or with some other intent, so that, while he would be guilty of an offence against the black-out regulations, he would not be guilty of an offence with intent to assist the enemy.

In this case the court cannot but feel that some confusion arose with regard to the question of intent by so much being said in the case with regard to the subject of duress. Duress is a matter of defence where a prisoner is forced by fear of violence or imprisonment to do an act which in itself is criminal. If the act is a criminal act, the prisoner may be able to show that he was forced into doing it by violence, actual or threatened, and to save himself from the consequences of that violence. There is very little learning to be found in any of the books or cases on the subject of duress and it is by no means certain how far the doctrine extends, though we have the authority both of Hale and of Fitzjames Stephen, that while it does not apply to treason, murder and some other felonies, it does apply to misdemeanors ; and offences against these regulations are misdemeanors. But here again, before any question of duress arises, a jury must be satisfied that the prisoner had the intention which is laid in the indictment. Duress is a matter of

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1947 have already said, where an intent is charged on the indictment,
it is for the prosecution to prove it, so the onus is the other way.

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STEANE. Now, another matter which is of considerable importance in
this case, but does not seem to have been brought directly to the
attention of the jury, is that very different considerations may
apply where the accused at the time he did the acts is in
subjection to an enemy power and where he is not. British
soldiers who were set to work on the Burma road or, if invasion
had unhappily taken place, British subjects who might have
been set to work by the enemy digging trenches would
undoubtedly be doing acts likely to assist the enemy. It would
be unnecessary surely in their cases to consider any of the
niceties of the law relating to duress, because no jury would
find that merely by doing this work they were intending to
assist the enemy. In our opinion it is impossible to say that
where an act was done by a person in subjection to the power
of others, especially if that other be a brutal enemy, an inference
that he intended the natural consequences of his act must be
drawn merely from the fact that he did it. The guilty
intent cannot be presumed and must be proved. The proper
direction to the jury in this case would have been that it was
for the prosecution to prove the criminal intent, and that
while the jury would be entitled to presume that intent if they
thought that the act was done as the result of the free un-
controlled action of the accused, they would not be entitled
to presume it, if the circumstances showed that the act was
done in subjection to the power of the enemy, or was as
consistent with an innocent intent as with a criminal intent,
for example, the innocent intent of a desire to save his wife and
children from a concentration camp. They should only convict
if satisfied by the evidence that the act complained of was in
fact done to assist the enemy, and if there was doubt about the
matter, the prisoner was entitled to be acquitted.

It is to be observed also in this case that in summing-up
the learned judge did not remind the jury of the various threats
to which the prisoner swore he had been exposed. The jury
might, of course, have disbelieved his evidence. The matters of
these threats depended upon his evidence alone, and while it is
fair to say that he does not appear to have been in any way
shaken in cross-examination on these matters, the jury were not
necessarily bound to believe it. But we do not think that the
summing-up contained anything like a full enough direction as

to the prisoner's defence. The defence must be fully put to the jury and we think they ought to have been reminded of various matters upon which the accused relied as negativing the intent. The jury may well have been left under the impression that, as they were told that a man must be taken to intend the natural consequences of his acts, these matters, as to which he had given evidence, were of no moment.

On both these grounds, therefore, we were of opinion that the conviction could not stand and accordingly quashed it.

Appeal allowed.

Conviction quashed.

Solicitor for the appellant : *The Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown : *The Director of Public Prosecutions.*

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The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1947, will be as follows:—

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2. — Pedestrian crossing places — Intersection of two roads—Four traffic light signals installed—Transit across one road divided by refuge—One crossing or two separate crossings—Whether second crossing controlled by light signal—Duty of driver approaching crossing—Green light—Driver of motor vehicle proceeding and turning right—Pedestrian on crossing knocked down—Traffic Signs (Size, Colour and Type) Provisional Regulations (dated Decem-

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3. — Pedestrian crossing places—Precedence of foot passengers over vehicular traffic—Crossing-place controlled by light signals—Duty of drivers of vehicles approaching crossing—Contributory negligence of foot passenger—Pedestrian Crossing Places (Traffic) Regulations, 1941 (St. R. & O. 1941, No. 397), reg. 3.

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4. — Premises adjoining — Nuisance — Landlord and tenant — Landlord with right to enter and do repairs—Forecourt between shop and highway pavement not railed off, in disrepair—Invitee of tenant injured thereby, when returning to highway—Liability.

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2. — County council's order for compulsory purchase of house and grounds—For residence of police superintendent with emoluments of 800l. a year—County police force "paid" by county council—Power to make order—Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 51), s. 97.

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2. — Licensing — Application for new justices licence—Bench equally divided—No order—Meeting adjourned for re-hearing of application by reconstituted bench—Licence granted by reconstituted bench—Confirmation of licence refused by county Licensing Committee—Whether licence rightly before confirming authority—Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24), s. 10, sub-s. 3.

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7. — Lease of farm being Crown property—Cottage on farm let by lessee to agricultural tenant—Claim for possession by landlord—Warrant under Small Tenements Recovery Act, 1838—Application to cottage of Rent Restriction Acts.

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8. — Rent Control Court — Jurisdiction — Furnished houses — Flats — Landlord to be contractually entitled to payment for use of furniture or "services"—Evidence—Furniture, in fact, on premises, not mentioned in lease—Services provided by landlord's porter, not mentioned in lease—Presumptions—Tribunal, no power to reduce rent for landlord's breach of covenant—Furnished Houses (Rent Control) Act, 1946 (9 & 10 Geo. 6, c. 34), s. 2, sub-s. 1; s. 12; sub-ss. 1 and 2.

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10. — Rent restriction — Application of Acts—Lease of shop with living rooms above—Sub-lease of living rooms without landlord's consent—Determination of tenant's interest—"Lawfully sub-let" — Question whether premises a "dwelling-house"—Burden of proof—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 15, sub-s. 3—Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 (1 & 2 Geo. 6, c. 26), s. 7, sub-s. 1.

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15. — Rent restriction — Occupied house purchased after prescribed statutory date—House vacated by tenant—Subsequent letting to new tenant—Claim for possession—"Landlord who has become landlord by purchasing the dwelling-house"—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32), sch. I. (h).

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16. — Rent restriction — Order for possession obtained by misrepresentation—Application for compensation—Jurisdiction of court when order for possession made by consent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5, sub-s. 6.

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17. — Rent restriction — Part of premises sub-let by statutory tenant—Validity of sub-lease—"Lawfully sub-let"—Landlord's acceptance of rent with knowledge of statutory tenant's breach of covenant—Principles of waiver—Extent of application to statutory tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 15, sub-s. 3—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (13 & 14 Geo. 5, c. 32), sch. I., para. (d).

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18. — Rent restriction — Recovery of possession—House required by landlord "for occupation as a residence for himself"—Landlord unable to live on premises—Occupation by family—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32), sch. I. (h).

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19. — Rent restriction — "Standard rent" — Dwelling-house subject to special statutory restrictions on September 1, 1939—Restrictions subsequently removed and Rent Restriction Acts becoming applicable—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-s. 1 (a)—Housing (Rural Workers) Act, 1926 (16 & 17 Geo. 5, c. 56), s. 3, sub-s. 1—Rent and Mortgage Interest Restrictions Act, 1939 (2 & 3 Geo. 6, c. 71), s. 3, sub-ss. 1, 2, sch. I.

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20. — See also PRACTICE.

21. — Rent restriction—Statutory tenancy—Breach of covenant in original lease—Intention to continue breach—Action for possession—Medical evidence that breach necessary for tenant's health—Refusal of order—Reasonableness—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 15, sub-s. 1—Rent Restrictions and Mortgage Interest (Amendment) Act, 1933, (23 & 24 Geo. 5, c. 32), s. 3, sub-s. 1, sch. 1.

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2. — Ordinary removal of justices' licence—Removal from premises in county to premises in borough in same county—Borough not county borough—Application to borough licensing justices—Right of justices to refuse jurisdiction—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5), ss. 2, 24, sub-s. 3.

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3. — Dangerous driving — Excessive speed—No actual danger to public—Circumstances to be taken into consideration—Duty of justices—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 11, sub-s. 1.

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POLICE—Discipline—Power of dismissal—Police inspector convicted of theft—Procedural requirements of regulations not complied with—Validity of dismissal—Appeal to Home Secretary—Order directing reinstatement in rank of constable—Jurisdiction of Home Secretary—Waiver of right to sue—Limitation of action against public authority—Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 5—Police (Appeals) Act, 1927 (17 & 18 Geo. 5, c. 19), s. 2, sub-s. 2—Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 21—Police Regulations, 1920 (St. R. & O. 1920, No. 1484).

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PRACTICE — Deceased person who was interested in action, but not a party—Appointment of person to represent his estate, for purposes of action—R. S. C. Or. 16, r. 46.

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2. — See also **CROWN PRACTICE, EMERGENCY LEGISLATION.**

3. — Emergency legislation — War damage — Multiple leave — Disclaimer — Application by landlords to county court for determination of fitness of premises—Form of notice of application—Landlord and Tenant (War Damage) Act, 1939 (2 & 3 Geo. 6, c. 72), s. 6 and s. 15 (as modified by Landlord and Tenant (War Damage) (Amendment) Act, 1941 (4 & 5 Geo. 6, c. 41), schedule.

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2. — *Exemptions* — *Lands exempted by private Inclosure Act from "all parochial taxes and duties"* — *No scheme made* — *Exemption from general rate* — *Land let on 999 years' lease* — *"Belongs" to freeholder* — *Stat. 17 Geo. 3, c. cxxv.* — *Rating and Valuation Act, 1925* (15 & 16 Geo. 5, c. 90), s. 2, s. 64, sub-ss. 1 and 2.

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3. — *Industrial hereditament* — *Egg packing station* — *"Adapting for sale"* — *Factory and Workshop Act, 1901* (1 Edw. 7, c. 22), s. 149, sub-s. 1 — *Rating and Valuation (Apportionment) Act, 1928* (18 & 19 Geo. 5, c. 44), s. 3, sub-ss. 1 and 2.

A. RICHARDSON & SON v. MIDDLESBROUGH BOROUGH ASSESSMENT COMMITTEE AND ANOTHER - - - **Divl. Ct. 958**

RATES AND RATING — *General rate* — *Non-payment by ratepayer* — *When rate becomes due and payable* — *Recovery by distress warrant* — *Poor Relief Act, 1601* (43 Eliz., c. 2), s. 4 — *Rating and Valuation Act* (15 & 16 Geo. 5, c. 90), s. 2.

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REVENUE — *Income tax* — *Profits from occupation of land* — *Lands insufficient for keep of cattle brought on* — *"Cattle" includes pigs* — *Income Tax Act, 1918* (8 & 9 Geo. 5, c. 40), *Rules applicable to Case III. of Sch. D., r. 4.*

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2. — *Income tax* — *Tips to taxi drivers* — *Assessability* — *Income Tax Act, 1918* (8 & 9 Geo. 5, c. 40), sch. E., r. 1.

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3. — *Income tax* — *Married woman* — *"Living with her husband"* — *"Living separate from her husband"* — *Income from property outside the United Kingdom* — *Assessment* — *Income Tax Act, 1918* (8 & 9 Geo. 5, c. 40), *All Schedules Rules, r. 16.*

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4. — *Stamp duty* — *Receipt for money* — *Entry on electricity prepayment meter card* — *Receipt not "given" to consumer* — *Stamp Act, 1891* (54 & 55 Vict., c. 39), s. 103, sch. I.

ATTORNEY-GENERAL v. NORTHWOOD ELECTRIC LIGHT AND POWER CO., LD.

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ROAD TRAFFIC — *Motor car* — *User on road without insurance against third party risks* — *Conviction* — *Disqualification for holding a licence* — *Special reasons for not imposing disqualification* — *Holder of licence misled by insurance company* — *Road Traffic Act, 1930* (20 & 21 Geo. 5, c. 43), s. 35, sub-s. 2.

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2. — *Third party insurance* — *Driver of motor vehicle under age limit* — *No driving licence and disqualified for holding or obtaining licence* — *Employers having no express knowledge that driver was under age and without licence* — *Failure to make enquiry* — *Constructive knowledge* — *Exceptions clause in policy of insurance* — *Person causing or permitting another to use vehicle on road* — *User covered by policy of person permitting* — *No necessity for additional policy covering person permitted* — *Road Traffic Act, 1930* (20 & 21 Geo. 5, c. 43), s. 35.

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SHIPPING — *Shipbuilding* — *Public dry dock* — *Several repairers at work on ship* — *One whose work necessitated the entry into dry dock* — *Not notional occupier* — *Concealed danger* — *Workman invitee falls through unlighted access hatch* — *Occupier at place of injury* — *Shipbuilding Regulations, 1931* (St. R. & O. 1931, No. 133) — *"Duties"* — *Factories Act, 1937* (1 Edw. 8 & 1 Geo. 6, c. 67), s. 60, sub-s. 1, s. 159, sub-s. 1.

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VENDOR AND PURCHASER — *Agreement for sale — Provision that it was a "provisional agreement until" fully legalized agreement drawn up and signed—Repudiation of bargain—Claim to recover deposit—Validity of agreement.*

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